

14
No. 95-1201-ATX

Title: Vicky M. Lopez, et al., Appellants
v.
Monterey County, California, et al.

Docketed:
January 29, 1996

Court: United States District Court for the
Northern District of California

Entry Date

Proceedings and Orders

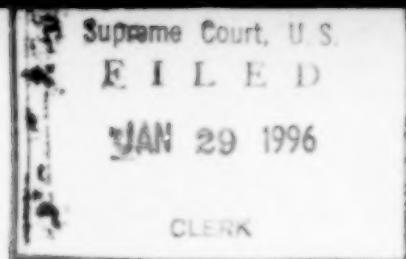
Jan 22 1996	Application (A95-606) for a stay of injunction pending appeal to this Court, submitted to Justice O'Connor.
Jan 23 1996	Response to application (A95-606) requested by Justice O'Connor, due January 26, 1996.
Jan 26 1996	Response to application (A95-606) filed by Solicitor General.
Jan 26 1996	Response to application (A95-606) filed by State of California.
Jan 26 1996	Response to application (A95-606) filed by Stephen A. Sillman, Intervenor-Appellee.
Jan 26 1996	Response to application (A95-606) filed by Monterey County.
Jan 29 1996	Statement as to jurisdiction filed. (Response due February 28, 1996)
Jan 29 1996	(A95-606) Referred to Court by Justice O'Connor.
Jan 30 1996	Application (A95-606) granted by Justice O'Connor. The application for stay of modification of an injunction filed November 1, 1995, by the United States District Court for the Northern District of California, case No. C-91-20559-RMW, presented to Justice O'Connor and by her referred to the Court is granted pending action by this Court on the statement as to jurisdiction. Should the appeal be dismissed or the judgment affirmed, this order shall terminate automatically. If probable jurisdiction is noted or postponed, this order shall continue in effect pending the sending down of the judgment of this Court.
Feb 28 1996	Motion of appellee State of California to dismiss or affirm filed.
Feb 28 1996	Motion of appellee -Intervenor Stephen A. Sillman to dismiss or affirm filed.
Mar 1 1996	LODGING consisting of 12 copies of Map 7B submitted by counsel for Intervenor-Appellee Sillman
Mar 8 1996	Brief of appellants in opposition to motion to dismiss or affirm of intervenor-appellee Stephen A. Sillman filed.
Mar 8 1996	Brief of appellants in opposition to motion of the appellee state of California to dismiss or affirm filed.
Mar 13 1996	DISTRIBUTED. March 29, 1996
Apr 1 1996	PROBABLE JURISDICTION NOTED. SET FOR ARGUMENT October 8, 1996. *****
Apr 18 1996	Order extending time to file brief of appellant on the merits until May 31, 1996.
May 16 1996	Joint appendix filed.
May 21 1996	Brief amicus curiae of United States filed.
May 30 1996	Brief amici curiae of American Civil Liberties Union, et al.

2 PP

Entry Date

Proceedings and Orders

filed.
May 31 1996 Brief of appellants Vicky M. Lopez, et al. filed.
Jun 28 1996 Motion of the Acting Solicitor General for leave to
participate in oral argument as amicus curiae and for
divided argument filed.
Jun 28 1996 Brief amicus curiae of Pacific Legal Foundation filed.
Jul 1 1996 Brief amicus curiae of California Judges Association filed.
Jul 3 1996 Brief of appellee California filed.
Aug 1 1996 Record filed.
Aug 5 1996 Reply brief of appellants Vicky Lopez, et al. filed.
Aug 14 1996 CIRCULATED.
Sep 5 1996 Motion of the Acting Solicitor General for leave to
participate in oral argument as amicus curiae and for
divided argument GRANTED.
Oct 8 1996 ARGUED.



No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

VICKY M. LOPEZ, CRESCENCIO PADILLA,
WILLIAM A. MELENDEZ, and DAVID SERENA, *Appellants*,

v.

MONTEREY COUNTY, CALIFORNIA,
STATE OF CALIFORNIA, *Appellees*,

and

STEPHEN A. SILLMAN, *Intervenor-Appellee*

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

- I. WHETHER IN AN ACTION TO ENFORCE SECTION 5 OF THE VOTING RIGHTS ACT, A DISTRICT COURT CAN ORDER AS A TEMPORARY COURT-ORDERED ELECTION PLAN AN AT-LARGE ELECTION SYSTEM, WHICH HAS NOT RECEIVED SECTION 5 PRECLEARANCE, FOR ELECTING JUDGES TO THE MONTEREY COUNTY MUNICIPAL COURT DISTRICT, CALIFORNIA, A POLITICAL SUBDIVISION SUBJECT TO THE SECTION 5 PRECLEARANCE PROVISIONS.
- II. WHETHER IN AN ACTION TO ENFORCE SECTION 5 OF THE VOTING RIGHTS ACT, A DISTRICT COURT CAN ORDER AS A TEMPORARY COURT-ORDERED ELECTION PLAN, AN ELECTION PLAN FOR ELECTING JUDGES TO THE MONTEREY COUNTY MUNICIPAL COURT DISTRICT, CALIFORNIA, WHICH DOES NOT COMPLY WITH THE STANDARDS APPLICABLE TO COURT-ORDERED ELECTION PLANS.
- III. WHETHER IN AN ACTION TO ENFORCE SECTION 5 OF THE VOTING RIGHTS ACT, THERE ARE EXTREME CIRCUMSTANCES JUSTIFYING THE USE OF A TEMPORARY COURT-ORDERED ELECTION PLAN INCORPORATING AN AT-LARGE ELECTION SYSTEM FOR ELECTING JUDGES TO THE MONTEREY COUNTY MUNICIPAL COURT DISTRICT, CALIFORNIA, WHICH HAS NOT RECEIVED SECTION 5 PRECLEARANCE, IN AN ELECTION SCHEDULED FOR MARCH 26, 1996.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
JURISDICTIONAL STATEMENT	1
OPINIONS DELIVERED IN THE CASE	1
STATEMENT OF JURISDICTION	1
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
ARGUMENT	12
CONCLUSION	29

TABLE OF AUTHORITIES

Cases

<i>Allen v. State Board of Elections</i> , 393 U.S. 544, 89 S.Ct. 817 (1969)	13, 14, 28
<i>Blanding v. Dubose</i> , 454 U.S. 393, 102 S.Ct. 715 (1982)	16
<i>Brooks v. State Bd. of Elections</i> , 790 F.Supp. 1156 (S.D.Ga. 1990)	19
<i>Campos v. City of Houston</i> , 968 F.2d 446 (5th Cir. 1992), <i>cert. denied</i> , ___ U.S. ___, 113 S.Ct. 971 (1993)	19
<i>Clark v. Roemer</i> , 498 U.S. 953, 111 S.Ct. 376 (1990), <i>as modified</i> , 498 U.S. 954, 111 S.Ct. 399	15
<i>Clark v. Roemer</i> , 500 U.S. 646, 111 S.Ct. 2096 (1991)	3, 15, 18
<i>Connor v. Finch</i> , 431 U.S. 407, 97 S.Ct. 1828 (1977)	26
<i>Connor v. Waller</i> , 421 U.S. 656, 95 S.Ct. 2003 (1973)	14
<i>Dougherty County, Ga. Bd. of Ed. v. White</i> , 439 U.S. 32, 99 S.Ct. 368 (1978)	16
<i>Edge v. Sumter County School District</i> , 775 F. 2d 1509 (11th Cir. 1985)	26
<i>Georgia v. U.S.</i> , 406 U.S. 901, 92 S.Ct. 1601 (1972)	14
<i>Georgia v. U.S.</i> , 406 U.S. 912, 92 S.Ct. 1761 (1972)	14

Table of Authorities
Cases Cont'd

<i>Georgia v. United States</i> , 411 U.S. 526, 93 S.Ct. 1702 (1973) . . .	14
<i>Hathorn v. Lovorn</i> , 457 U.S. 255, 102 S.Ct. 2421 (1982)	15
<i>Johnson v. Miller</i> , 864 F.Supp. 1354 (S.D.Ga. 1994)	20, 21
<i>Lopez v. Monterey County, California</i> , 871 F.Supp. 1254 (1994)	2
December 20, 1994, Order	<i>passim</i>
November 1, 1995, Order	<i>passim</i>
November 20, 1995, Order	9
November 21, 1995, Order	9
November 30, 1995, Order	10
January 2, 1996, Order	10
<i>Louisiana v. U.S.</i> , 380 U.S. 145, 85 S.Ct. 817 (1965)	23
<i>McCain v. Lybrand</i> , 465 U.S. 236, 104 S.Ct. 1037 (1984) . . .	16, 17
<i>McDaniel v. Sanchez</i> , 452 U.S. 130, 101 S.Ct. 2224 (1981) . . .	26
<i>Miller v. Johnson</i> , __ U.S. __, 115 S.Ct. 2475 (1995) . . .	9, 17, 19- 26

Table of Authorities
Cases Cont'd

<i>Mississippi State Chapter, Operation Push, Inc., v. Mabus</i> , 932 F.2d 400 (5th Cir. 1991)	23
<i>Monterey County, California v. United States of America</i> , Civil Action No. 93-1639 (CRR, SSH, KLH (U.S.C.A.)) (D.D.C. filed August 10, 1993)	6
<i>N.A.A.C.P. v. Hampton County Election Com'n</i> , 470 U.S. 166, 105 S.Ct. 1128 (1985)	16, 17
<i>Perkins v. Matthews</i> , 400 U.S. 379, 91 S.Ct. 431 (1971)	14
<i>Presley v. Etowah County Com'n</i> , __ U.S. __, 112 S.Ct. 820 (1992)	17
<i>State of Mississippi v. Smith</i> , 541 F.Supp. 1329 (D.D.C. 1982), <i>appeal dismissed</i> , 461 U.S. 912, 103 S.Ct. 1888 (1983)	27
<i>State of Mississippi v. United States</i> , 490 F.Supp. 569 (D.D.C. 1979), <i>sum. aff'd</i> , 444 U.S. 1050, 100 S.Ct. 994 (1980)	27
<i>State of South Carolina v. Katzenbach</i> , 383 U.S. 301, 86 S.Ct. 803 (1966)	13
<i>State of Texas v. United States</i> , 785 F.Supp. 201 (D.D.C. 1982)	27
<i>U.S. v. Board of Supervisors</i> , 429 U.S. 642, 97 S.Ct. 833 (1977)	14
<i>United States v. Bd. of Com'rs of Sheffield, Ala.</i> , 435 U.S. 110, 98 S.Ct. 965 (1978)	16

Table of Authorities
Cases Cont'd

Upham v. Seamon, 456 U.S. 37, 102 S.Ct. 1518 (1982). 26

Wise v. Lipscomb, 437 U.S. 535, 98 S.Ct. 2493 (1978) 28

State Constitutional Provisions

Article VI, Sections 16 (b) & (d) of the California State Constitution
 5, 7

Article VI, Section 5 (a) of the California State Constitution . . . 7

Federal Statutes

28 U.S.C. § 1253 2, 10

28 U.S.C. § 2101 (b) 2, 10

42 U.S.C. § 1973 c *passim*

Federal Rules

Fed. Rules of Evidence Rule 201, 28 U.S.C.A. 9

Federal Regulations

28 C.F.R. Appendix to Part 51. 3

28 C.F.R. § 51.54 (b) 27

Table of Authorities
Cont'd

Legislative History

Senate Report No. 94-295, 94th Congr., 1st Sess., at 19 (July 22, 1975) 26

Senate Report No. 97-417, 97th Congr., 2d Sess. (May 25, 1982)
 23

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

VICKY M. LOPEZ, CRESCENCIO PADILLA,
WILLIAM A. MELENDEZ, and DAVID SERENA, *Appellants*,

v.

MONTEREY COUNTY, CALIFORNIA,
STATE OF CALIFORNIA, *Appellees*,

and

STEPHEN A. SILLMAN, *Intervenor-Appellee*

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

JURISDICTIONAL STATEMENT

OPINION BELOW

The Order Modifying Injunction filed by the United States District Court for the Northern District of California on November 1, 1995, is not yet reported and is reprinted in full in the Appendix. App. 1.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 42 U.S.C. § 1973 c and 28 U.S.C. § 1253 to review the November 1, 1995, Order Modifying Injunction filed by the United States District Court for the Northern District of California. The November 1, 1995, Order Modifying Injunction was entered on November 9, 1995. The District Court denied Appellants' Motion for Reconsideration on November 30, 1995. App. 25. The appeal was filed on November 30, 1995, App. 26, well within the thirty day time period specified by 28 U.S.C. § 2101 (b).

STATUTORY PROVISIONS
FEDERAL REGULATIONS

42 U.S.C. § 1973 c. The statute is reproduced in the Appendix (App. 85).

28 C.F.R. § 51.54 (b). The federal regulation is reproduced in the Appendix (App. 87).

STATEMENT OF THE CASE

This is an appeal from an Order modifying a previous injunction in an action to enforce the Section 5 preclearance provisions of the Voting Rights Act, 42 U.S.C. § 1973 c, in Monterey County, California. The Order modifying the injunction was filed on November 1, 1995, by the United States District Court for the Northern District of California. App. 1. The Order modifies an injunction filed by the District Court on December 20, 1994.¹ The

¹ The District Court's December 20, 1994, Order is reported. *Lopez v. Monterey County, California*, 871 F.Supp. 1254 (1994). The December 20, 1994, Order is also included in the Appendix. App. 10.

November 1, 1995, Order results in the enforcement and implementation of a change affecting voting in Monterey County, California, which has not received preclearance as mandated by Section 5 of the Voting Rights Act.

Monterey County, California, is a political subdivision subject to the special Section 5 preclearance provisions of the Voting Rights Act. Monterey County became subject to the Section 5 preclearance provisions on November 1, 1968. 28 C.F.R. Appendix to Part 51. Section 5 requires Monterey County to secure an administrative ruling from the United States Attorney General or a declaratory judgment from the United States District Court for the District of Columbia that a change affecting voting, subject to the Section 5 provisions, does not have the purpose and does not have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. 42 U.S.C. § 1973 c. Such a change affecting voting cannot be enforced or implemented in any elections until the requisite Section 5 preclearance is obtained. *Clark v. Roemer*, 500 U.S. 646, 652 - 653, 111 S.Ct. 2096, 2101 (1991) ("If voting changes subject to § 5 have not been precleared, § 5 plaintiffs are entitled to an injunction prohibiting the State from implementing the changes.").

Monterey County, California, according to the 1990 Census had a 34% Latino population. App. 94 (Stipulations of Plaintiffs and Monterey County filed March 16, 1994, App. 92). Monterey County has experienced a significant growth rate among the Hispanic Origin population. From 1980 to 1990, the Hispanic Origin population growth rate was 59.1% while the white non-Hispanic population growth rate was 7.3%. App. 94. This Hispanic Origin population is geographically concentrated in the eastern part of the City of Salinas, the Castroville-Pajaro Valley north county area, and the south county area which includes the Cities of Gonzales, Soledad, Greenfield, and King City. App. 95. Although constituting 34% of the county's population, the Latino population constitutes 17% of the county's

eligible voter population. App. 91 (Demographic summary table of temporary election plan ordered by the District Court in the December 20, 1994, Order, App. 88. - Table attached to correspondence, dated January 6, 1995, from Monterey County Counsel, Douglas C. Holland, to the District Court (correspondence filed January 10, 1995)).

The Latino population in Monterey County is characterized by certain factors in the areas of education, language, employment, health, and housing, which may hinder their ability to effectively participate in the political process. App. 99. Of those persons who were over the age of 25 years in 1990, Latinos constituted only 19% of those persons who completed four years of high school and only 5% of those persons who had a bachelor's degree. App. 99 - 100. For 1990, in Monterey County, approximately 92% of the total civilian force was employed, while only 27% of the Spanish Origin labor force was employed. App. 101. In the area of poverty, Latinos also experienced rates which were greater. For 1990, 12% of the total population in Monterey County was below the poverty level, while the comparable figure for Latinos was 21%. App. 101. The mean income in 1989 for Spanish Origin households (\$ 32,233) was less than the figure for all households in Monterey County (\$ 43,185). App. 102. As to English language skills in 1990, there was a significant number of Latinos five years and over who spoke Spanish at home and did not speak English well or not at all (31,432) and a slightly smaller number (29,636) who were classified as linguistically isolated. App. 102. There was more overcrowding in Spanish Origin households in 1990. The total number of persons per occupied housing units for the county was 2.96, while the comparable figure for the Hispanic origin population was 4.34. App. 103.

These depressed socio-economic characteristics for the Latino population in Monterey County are reflective of the lack of Latino access to the political process. At the time of the filing of this action on September 6, 1991, there had never been a Latino municipal court

judge in Monterey County. App. 103. Membership on the municipal court in Monterey County is accomplished by way of an appointment by the Governor of California or by a successful election. Article 6, Section 16 (b) & (d) of the California State Constitution. At the time of the filing of this litigation in 1991, the Governor of California had never appointed a Latino to serve on the Monterey County Municipal Court District and the only two Latino candidates for the municipal court lost in the 1986 elections. App. 103. There was a similar absence of Latino representation on the Monterey County Board of Supervisors from 1890 to 1992. App. 98.

Elections in Monterey County are characterized by Anglo bloc voting which in the past has defeated the electoral choices of the Latino community. App. 96. This Anglo bloc voting coupled with a numbered place system for electing judges to the Monterey County Municipal Court District has impaired the opportunity of the Latino community to elect candidates of their choice. App. 99.

The Latino community has also experienced discrimination that has touched upon the rights of Latinos to effectively participate in the political process. The implementation of an English literacy requirement as a prerequisite to registering to vote in 1895 and enforced as late as the 1960s served to discriminate against those Latinos who did not understand or speak English. App. 97. Moreover, on two separate occasions, the United States Attorney General pursuant to Section 5 of the Voting Rights Act issued letters of objection disapproving an inadequate bilingual election procedure and a county board of supervisor redistricting plan which divided a politically cohesive Latino community. App. 97. And most recently, Monterey County has stipulated that the County "... is unable to establish that several of Monterey County's judicial district consolidation ordinances ... did not have the effect of denying the right to vote to Hispanics in Monterey County due to the retrogressive effect several of these ordinances had on Hispanic voting strength." App. 98 - 99.

This description of the Latino community's socio-economic conditions, the presence of Anglo bloc voting, and the voting discrimination directed at the Latino community in Monterey County provides an important context for the Court's consideration of the issues raised by this action and appeal.

Appellants filed this action to require Monterey County to comply with the Section 5 preclearance provisions. The Appellants sought an order requiring Monterey County to submit a series of county ordinances to the United States Attorney General for Section 5 administrative preclearance, or, alternatively, requiring Monterey County to seek Section 5 judicial preclearance of these county ordinances in the United States District Court for the District of Columbia. These county ordinances consolidated municipal court districts and justice court districts. App. 10.

On November 1, 1968, the date of Section 5 coverage for Monterey County, there were two municipal court districts and seven justice courts in Monterey County. App. 15, n. 3. By 1983, there was one county-wide municipal court district. App. 12. These judicial district consolidations modified the method of electing judges to the Monterey County Municipal Court District. As a result of these county ordinances elections for municipal court judges were changed from a district election basis to a single at-large or county-wide election system.

The Three Judge District Court ruled that these county ordinances were subject to the Section 5 preclearance provisions.² App. 12. Monterey County subsequently filed a declaratory judgment action in the United States District Court for the District of Columbia seeking Section 5 preclearance of these county ordinances. *Monterey County, California v. United States of America*, Civil Action No. 93-

² Actions to enforce Section 5 require the convening of a Three Judge Court. 42 U.S.C. § 1973 c.

1639 (CRR, SSH, KLH (U.S.C.A.)) (D.D.C. filed August 10, 1993). The Section 5 declaratory judgment action was subsequently dismissed by Monterey County. Monterey County could not demonstrate that several of these county ordinances did not result in a retrogression of minority voting strength and thus could not receive the requisite Section 5 preclearance. *Id.* (October 7, 1993, Stipulated Dismissal). App. 12 - 13.

Monterey County then submitted several election plans for the District Court's review. The election plans could not be unilaterally implemented by Monterey County. The election plans created election districts which were smaller than the county-wide municipal court district. In addition, the election plans divided the City of Salinas. The State of California intervened and argued that by dividing the City of Salinas the proposed election district plans violated Article VI, Section 5 (a) of the California State Constitution. Article VI, Section 5 (a) prohibits the division of any municipality into two or more municipal court districts. Also, the State argued that the separation of the electoral and jurisdictional bases of municipal court judges, as presented in the proposed election district plans, violated Article VI, Section 16 (b) of the California State Constitution.³ Article VI, Section 16 (b) has been interpreted by the State as requiring a strict linkage between the jurisdictional and electoral bases of the municipal court judges. App. 12 - 13, 19.

On December 20, 1994, the District Court issued an Order. App. 10. To avoid any further delay in elections for the Monterey County Municipal Court District, the District Court ordered a special election for municipal court judges scheduled for June 6, 1995. The District Court further ordered Monterey County to implement, on a

³ The State argued that under the proposed election plans, the election district was smaller than the area of the municipal court's county-wide jurisdiction. Thus, the jurisdictional base and the electoral base were not coterminous.

temporary basis, a previously submitted district election plan in the special election. App. 23 - 24.

Pursuant to the District Court's December 20, 1994, Order, Monterey County submitted the temporary district election plan to the United States Attorney General for Section 5 preclearance. App. 23. On March 6, 1995, the United States Attorney General precleared the temporary district election plan.⁴ The District Court also enjoined any future elections to the Monterey County Municipal Court District pending the adoption and Section 5 preclearance of a permanent plan or until further order of the District Court.⁵

As a result of the June 6, 1995, special election and appointments by California State Governor Pete Wilson, there are now two Latino judges.⁶ The terms of these newly elected judges are

⁴ The March 6, 1995, preclearance letter is included in the Appendix. App. 53. The March 6, 1995, preclearance letter is an attachment to an administrative ruling issued by the United States Attorney General on November 13, 1995. App. 28. The March 6, 1995, preclearance letter is listed as Attachment C to the November 13, 1995, administrative ruling.

⁵ In ordering a special election, the District Court subordinated the state interests expressed by the State of California and suspended applicable constitutional provisions to permit Monterey County to adopt the temporary election plan. App. 19 - 22.

⁶ In the Application to Stay filed with this Court, the Appellants noted that the official record of these proceedings did not contain a reference to the two Latino Municipal Court Judges who were recently elected in 1995 and are now serving on the Municipal Court. Appellants were in error. This fact was communicated to the District Court at the September 28, 1995, Status Conference in this Case. App. 111. In any event, this Court can take judicial notice of

due to expire in January of 1997. App. 2.

On November 1, 1995, the District Court filed an Order modifying the injunction granted on December 20, 1994. App. 1. Although the District Court recognized that there was a continuing Section 5 violation, App. 2, the District Court declined to extend the terms of those municipal court judges elected pursuant to the temporary district election plan in the June 6, 1995 special judicial election. The basis for the District Court's ruling was its expressed concerns regarding the constitutionality of the temporary district election plan used in the special judicial election. Citing this Court's decision in *Miller v. Johnson*, __ U.S. __, 115 S.Ct. 2475 (1995), the District Court concluded that there is substantial doubt that race-based districts "... can ever withstand constitutional scrutiny." App. 3. Since the terms of those municipal court judges elected in the special election were due to expire in January of 1997 and Monterey County had not implemented a Section 5 precleared permanent plan for electing municipal court judges, the District Court ordered Monterey County to conduct municipal court elections on an at-large or county-wide basis in the upcoming March 26, 1996, elections with any run-off elections to be held on November 5, 1996. App. 8.⁷

The at-large or county-wide method of electing municipal court judges resulting from the implementation of county ordinances which are the subject of this Section 5 enforcement action have not

this fact. Fed. Rules of Evidence Rule 201, 28 U.S.C.A.

⁷ Subsequent Orders filed by the District Court clarified the November 1, 1995, Order to permit run-off elections and defined the terms of those municipal court judges to be elected at the March 26, 1996, elections (November 20, 1995, District Court Order), as well as, adopted the election schedule proposed by Monterey County (November 21, 1995, District Court Order). These Orders are not included in the Appendix.

received the necessary Section 5 preclearance. The absence of any Section 5 preclearance was confirmed on November 13, 1995, by the United States Attorney General in an administrative ruling specifically stating that the at-large or county-wide method of electing municipal court judges had not received the required Section 5 preclearance. App. 29 ("Contrary to representations that apparently were made at that status conference, the at-large method of election for the municipal court judges in Monterey County was never submitted for Section 5 review, and it has not been precleared.").

The District Court on November 30, 1995, issued an Order denying Appellants' motion for reconsideration, which was based in part on the November 13, 1995, administrative ruling by the United States Attorney General. App. 25. The District Court stated that the basis for ordering county-wide elections for municipal court judges was the District Court's equitable powers to fashion a temporary remedy pending the Section 5 preclearance of an election plan which does not violate state law. The District Court's Order "... was not based on any assumption that county-wide elections for municipal court judges had been precleared." App. 25.

On November 30, 1995, the Appellants filed their Notice of Appeal. App. 26.⁸ On January 2, 1996, the District Court denied Appellants' motion for a stay pending appeal. The one sentence order is not included as part of the Appendix. An Application to Stay is pending before Circuit Justice Sandra Day O'Connor.

This appeal seeks review of the District Court's November 1, 1995, Order modifying the December 20, 1994, injunction. The

⁸ Direct appeal of the granting of the November 1, 1995, interlocutory injunction to this Court in a Section 5 enforcement action is mandated by 42 U.S.C. § 1973 c and 28 U.S.C. § 1253. The appeal was filed within the 30 day period specified in 28 U.S.C. § 2101 (b).

appeal seeks to prevent Monterey County from implementing a county-wide election for municipal court judges which has not received the required Section 5 preclearance. Although the District Court ordered county-wide elections as a temporary court-ordered remedy, the Order in effect is enforcing and implementing a change affecting voting which violates the Section 5 preclearance provisions.

Should this Court note probable jurisdiction and reverse the District Court's November 1, 1995, Order Modifying Injunction, Appellants will seek from the District Court an extension of the terms of those municipal court judges elected in the special June 6, 1995, election, which are due to expire in January of 1997. Such an extension will be necessary if new municipal court judges are not elected pursuant to a Section 5 precleared election prior to the expiration of those judicial terms. Moreover, if the Application to Stay is granted, or if the Appellants are successful in securing a reversal of the November 1, 1995, District Court Order, Monterey County, in accordance with the December 20, 1994, Order, will continue to be enjoined from enforcing and implementing any election plan for municipal court judges until such plan has secured Section 5 preclearance.⁹

⁹ The United States has participated extensively as *amicus curiae* in the proceedings before the District Court. This participation has consisted of the March 6, 1995, Section 5 preclearance of the temporary district election plan which was implemented in the June 6, 1995, special municipal court election, and the issuance of an administrative ruling on November 13, 1995, stating that the county-wide method of electing municipal court judges had not received Section 5 preclearance. In addition, the United States supported the Appellants' motion for reconsideration and their request for a stay of the November 1, 1995, Order.

I. Argument - The Questions Presented are Substantial

This appeal centers on the important issue of whether a District Court can order, of what amounts to in effect, the implementation of a change affecting voting which has not received the requisite Section 5 preclearance. The adjudication of this issue raises substantial questions regarding the enforcement of the Section 5 preclearance provisions of the Voting Rights Act, especially in view of the circumstances presented by this case. As previously stated, a special judicial election was held on June 6, 1995, based upon an election plan which received the required Section 5 preclearance on March 6, 1995. Jurisdictional Statement at 8. Accordingly, there are municipal court judges who have been elected pursuant to a Section 5 precleared election plan. The District Court's November 1, 1995, Order will result in the replacement of these judges with judges who will be elected pursuant to an election plan which has not secured the necessary Section 5 approval. The least drastic alternative in this instance would be to maintain in office the current judges rather than to order the implementation of an election system which violates the Voting Rights Act. The District Court's November 1, 1995, Order is inconsistent with this Court's precedent which has repeatedly upheld the rights of minority voters to secure an injunction preventing the implementation of any election changes which have not received Section 5 preclearance. In view of this inconsistency, the District Court's Order raises substantial questions regarding the enforcement of the Voting Rights Act.

A. The At-Large or County-wide Method of Electing Municipal Court Judges in Monterey County has not Received Section 5 Preclearance.

There can be no dispute that the county-wide method of electing municipal court judges has not received Section 5 preclearance. On November 13, 1995, the United States Attorney General issued an administrative ruling determining that the county-

wide election system for municipal court judges in Monterey County has never been approved pursuant to Section 5. As noted by the United States Attorney General:

"Contrary to representations that apparently were made at ... [the September 28, 1995] status conference, the at-large method of election for the municipal court judges in Monterey County was never submitted for Section 5 review, and it has not been precleared.

... Thus, it is clear from the submission letter that the at-large method of election was never submitted for Section 5 review, and the March 6, 1995, preclearance letter [approving the interim plan for the June 6, 1995, special election] demonstrates that the Attorney General did not review or preclear the at-large method of election."

App. 29 & 31. By ordering county-wide municipal court elections, the District Court is in effect ordering the implementation of a change affecting voting which has not received the requisite approval under Section 5.

This Court since 1966 has held that voting changes subject to the Section 5 preclearance provisions cannot be implemented in any election until Section 5 approval is obtained. Beginning with *State of South Carolina v. Katzenbach*, 383 U.S. 301, 335, 86 S.Ct. 803, 822 (1966), this Court noted that voting changes subject to the Section 5 preclearance provisions were automatically suspended: "The Act automatically suspends the operation of voting regulations enacted after November 1, 1964, and furnishes mechanisms for enforcing the suspension." In *Allen v. State Board of Elections*, 393 U.S. 544, 555, 89 S.Ct. 817, 826 (1969), this Court recognized the right of private parties to secure an injunction to prevent the implementation of

election changes which have not been submitted for Section 5 approval: "Further, after proving that the State has failed to submit the covered enactment for § 5 approval, the private party has standing to obtain an injunction against further enforcement, pending the State's submission of the legislation pursuant to § 5." (footnote omitted) See also *Id.*, 393 U.S. at 562 - 563, 89 S.Ct. at 830 ("The result of both suits [including a private Section 5 enforcement action] can be an injunction prohibiting the State from enforcing its election laws."). In fact in *Allen*, this Court issued injunctions against the enforcement of unprecleared voting changes: "All four cases are remanded to the District Courts with instructions to issue injunctions restraining the further enforcement of the enactments until such time as the States adequately demonstrate compliance with § 5." *Id.*, 393 U.S. at 572, 89 S.Ct. at 835.

Subsequent precedent by this Court has been consistent with *Allen*. *Perkins v. Matthews*, 400 U.S. 379, 397, at n. 14, 91 S.Ct. 431, 441, at n. 14 (1971) (City could implement only those voting changes which received Section 5 approval); *Georgia v. United States*, 411 U.S. 526, 541, 93 S.Ct. 1702, 1711 (1973) ("The case is remanded to the District Court with instructions that any future elections under the Georgia House reapportionment plan be enjoined unless and until the State ... [secures Section 5 approval].")¹⁰; *Connor v. Waller*, 421 U.S. 656, 95 S.Ct. 2003 (1973) ("Those Acts [legislative reapportionments] are not now and will not be effective as laws until and unless cleared pursuant to § 5."); *U.S. v. Board of Supervisors*, 429 U.S. 642, 645, 97 S.Ct. 833, 834 (1977) ("Attempts

¹⁰ In *Georgia*, the District Court issued an injunction against the enforcement of the 1972 legislative redistricting plan in the 1972 elections. This Court without comment granted a stay of the District Court's injunction. *Georgia v. U.S.*, 406 U.S. 901, 92 S.Ct. 1601 (1972). A subsequent application by the United States to vacate the stay was denied. *Georgia v. U.S.*, 406 U.S. 912, 92 S.Ct. 1761 (1972).

to enforce changes that have not been subjected to § 5 scrutiny may be enjoined by any three-judge district court in a suit brought by a voter ..."). State courts are also required to enjoin the implementation of any voting changes which have not received the requisite Section 5 approval. *Hathorn v. Lovorn*, 457 U.S. 255, 269 - 270, 102 S.Ct. 2421, 2430 (1982) ("When a party to a state proceeding asserts that § 5 renders the contemplated relief unenforceable, therefore, the state court must examine the claim and refrain from ordering relief that would violate federal law." (footnote omitted)).

Most recently, this Court reaffirmed the rights of Section 5 plaintiffs to secure injunctive relief preventing the implementation of any voting changes which have not been approved pursuant to Section 5. In *Clark v. Roemer*, 498 U.S. 953, 111 S.Ct. 376 (1990), *as modified*, 498 U.S. 954, 111 S.Ct. 399, an application for an injunction and a stay was granted in part. The injunction enjoined the implementation of a Section 5 unprecleared voting change, in this case the creation of additional judicial seats, in upcoming elections, the first of which was scheduled about a week away.¹¹ In the subsequent decision, this Court stated in unambiguous terms that Section 5 plaintiffs are entitled to an injunction preventing the implementation of any changes affecting voting which have not received the required Section 5 preclearance. *Clark, supra*, 500 U.S. at 652 - 653, 111 S.Ct. at 2101.

As previously stated, the United States Attorney General in an administrative ruling dated November 13, 1995, determined that the county-wide method of electing municipal court judges in Monterey

¹¹ The application was filed on October 29, 1990 - the elections were scheduled for November 6, 1990, and December 8, 1990. *Clark, supra*, 500 U.S. at 651, 111 S.Ct. at 2100 ("On November 2, we granted the application in part and enjoined the elections for the judgeships that the District Court conceded were uncleared.").

County had not received Section 5 preclearance. App. 28.¹² Such an administrative interpretation given the central role of the Attorney General in the Section 5 preclearance process is entitled to deference. *United States v. Bd. of Com'rs of Sheffield, Ala.*, 435 U.S. 110, 131, 98 S.Ct. 965, 979 (1978) ("In recognition of the Attorney General's key role in the formulation of the Act, this Court in the past has given great deference to his interpretations of it."); *Blanding v. Dubose*, 454 U.S. 393, 401, 102 S.Ct. 715, 719 (1982) ("Finally, we have frequently stated that courts should grant deference to the interpretation given statutes and regulations by the officials charged with their administration.") (Court agreed with Attorney General's interpretation that the receipt of certain documents constituted a request for reconsideration of a previously issued Section 5 objection letter, rather than a new submission of a voting change); *Dougherty County, Ga. Bd. of Ed. v. White*, 439 U.S. 32, 39, 99 S.Ct. 368, 373 (1978) ("Given the central role of the Attorney General in formulating and implementing § 5, this interpretation of its scope is entitled to particular deference.") (Court agreed with the Attorney General's conclusion that a personnel rule requiring an employee of the school district who becomes a candidate for any elective office to take a leave of absence without pay was a rule which required Section 5 approval).

Moreover, if there is any ambiguity in applying the Section 5 preclearance provisions, such ambiguity must be resolved against the submitting jurisdiction. *McCain v. Lybrand*, 465 U.S. 236, 257, 104 S.Ct. 1037, 1050 (1984) ("To the extent there was any ambiguity in the scope of the preclearance request, the structure and purpose of the preclearance requirement plainly counsel against resolving such

¹² The fact that the county-wide election system will be implemented in only one election does not insulate the change in voting procedure from the Section 5 preclearance provisions. *N.A.A.C.P. v. Hampton County Election Com'n*, 470 U.S. 166, 178, 105 S.Ct. 1128, 1135 (1985) ("The Voting Rights Act reaches changes that affect even a single election." (footnote omitted)).

ambiguities in favor of the submitting jurisdiction in the circumstances of this case.”). *See also N.A.A.C.P., supra*, 470 U.S. at 178 - 179, 105 S.Ct. at 1135 (“Any doubt that these changes are covered by § 5 is resolved by the construction placed upon the Act by the Attorney General, which is entitled to considerable deference.” (footnote omitted)). In the present case, if the November 13, 1995, administrative determination by the United States Attorney General that the at-large municipal court election system has not received Section 5 preclearance is deemed to be ambiguous, such ambiguity must be resolved against Monterey County. However, the language of the November 13, 1995, administrative determination is clear.¹³ The United States Attorney General has clearly stated that the at-large or county-wide method of electing municipal court judges in Monterey County has not received Section 5 preclearance.¹⁴

¹³ Although the November 13, 1995, correspondence is an after the fact administrative interpretation, it is nevertheless entitled to deference by this Court. *See, e.g., McCain, supra*, 465 U.S. at 255 - 256, 104 S.Ct. at 1049 (“Finally, the Justice Department has recently indicated that the changes made in the 1966 Act and retained in the 1971 amendment have not been precleared ... and such after-the-fact Justice Department statements have been previously relied upon in determining whether a particular change was actually precleared in analogous circumstances.”).

¹⁴ This deference to the United States Attorney General’s administrative interpretation of the Section 5 preclearance provisions is not without limits. *See Presley v. Etowah County Com’n*, ___ U.S. ___, 112 S.Ct. 820, 831 (1992) (where this Court did not defer to an administrative interpretation provided by the Attorney General, because Congress specifically stated its intent that § 5 reached only those changes affecting voting); *Miller v. Johnson, supra* (where this Court did not defer to an administrative interpretation which was not authorized by the Voting Rights Act). In the present litigation, the United States Attorney General’s determination concluding that a

Given the absence of any Section 5 preclearance, the District Court’s November 1, 1995, Order implementing the at-large method of electing municipal court judges in Monterey County presents a clear violation of the Voting Rights Act and thus presents a substantial question for noting probable jurisdiction.

B. There are no “Extreme Circumstances” Warranting the Issuance of an Order Implementing a Method of Election Which has not Received Section 5 Preclearance.

Although federal courts can implement voting changes which have not received Section 5 approval, federal courts have been reluctant to order the use of such unprecleared election changes. As previously noted, in *Clark*, this Court granted an emergency application to enjoin elections based upon a voting change which had not received Section 5 approval. The emergency application which was filed on October 29, 1990, sought to enjoin the implementation of a voting change in the elections scheduled for November 6 and December 8, 1990. *Clark, supra*, 500 U.S. at 651, 111 S.Ct. at 2100. Although this Court did not decide the issue of under what circumstances an election based upon a Section 5 unprecleared voting change could proceed,¹⁵ the Court, nevertheless, did suggest that such an implementation of a Section 5 unprecleared election change should be reserved for “extreme circumstances.” As an example, the Court cited to an instance where the covered jurisdiction becomes aware of

certain change affecting voting had not been submitted for Section 5 preclearance was well within her administrative authority and, thus, this Court, consistent with previous decisions, should defer to this administrative interpretation.

¹⁵ *Id.*, 500 U.S. at 654, 111 S.Ct. at 2102 (“We need not decide today whether there are cases in which a district court may deny a § 5 plaintiff’s motion for injunction and allow an election for an unprecleared seat to go forward.”).

an unprecleared election change on the eve of the election.¹⁶

There are no extreme circumstances present in this Section 5 litigation. The municipal court elections are scheduled for March 26, 1996, well over two months from now. There are other alternatives which would not violate Section 5 of the Voting Rights Act. One such alternative is to extend the terms of those municipal court judges elected in the June 6, 1995, special election.¹⁷ A similar remedy could be provided, especially since the municipal court judges elected in the June 6, 1995, special election were elected pursuant to an election plan which received Section 5 preclearance.

Finally, this Court's decision in *Miller* also does not constitute an extreme circumstance providing a justification to implement an unprecleared Section 5 voting change. *Miller* involved a constitutional challenge to the congressional redistricting plan for the State of Georgia. In *Miller* the Supreme Court held that a race-based redistricting plan, where race was the predominant motivating factor in placing significant numbers of persons either within or outside a proposed district, is unconstitutional unless the "... districting legislation is narrowly tailored to achieve a compelling interest."

¹⁶ See also *Campos v. City of Houston*, 968 F.2d 446 (5th Cir. 1992), *cert. denied*, __ U.S. __, 113 S.Ct. 971 (1993) (court abused its discretion in implementing Section 5 unprecleared election plan when Section 5 precleared plan was available.).

¹⁷ See *Brooks v. State Bd. of Elections*, 790 F.Supp. 1156 (S.D.Ga. 1990) (judicial terms extended pending Section 5 compliance). The District Court in the present case expressed its reservation in extending any judicial terms which were based upon an election plan whose constitutionality is in question. However, such a reservation cannot justify a clear violation of Section 5, especially since there has been no finding by the District Court that the temporary election plan is in fact unconstitutional.

Miller, supra, __ U.S. at __, 115 S.Ct. at 2490. A brief review of the facts in *Miller* is necessary to demonstrate that the Supreme Court's holding is inapplicable to the present case where there is a violation of Section 5 of the Voting Rights Act.

The State of Georgia is subject to the Section 5 preclearance provisions of the Voting Rights Act. After the 1990 Census was published the State redistricted its congressional districts. During the time period from 1980 to 1990 there was only one majority Black congressional district. As a result of population growth, the State's allocation of congressional seats increased from 10 to 11. *Miller, supra*, __ U.S. at __, 115 S.Ct. at 2483.

The State adopted its first congressional redistricting plan in 1991. The 1991 redistricting plan contained two majority Black congressional districts and a third congressional district containing a 35% Black voting age population. When the plan was submitted for Section 5 approval, the United States Attorney General issued a letter of objection preventing the implementation of the 1991 redistricting plan. The basis of the letter of objection was the State's failure to avoid the fragmentation of the Black population. *Miller, supra*, __ U.S. at __, 115 S.Ct. at 2493 - 94.

The State submitted a second congressional redistricting plan for Section 5 approval on March 3, 1992. *Johnson v. Miller*, 864 F.Supp. 1354, 1364 (S.D.Ga. 1994). Although the redistricting plan increased the Black population concentrations in the three predominantly Black congressional districts, the United States Attorney General issued a second letter of objection on March 20, 1992. *Id.*, at 1365. The basis for the second letter of objection was that the State still did not incorporate certain Black population areas into the predominantly Black congressional districts. Accordingly, the State adopted a third congressional redistricting plan which eventually received the requisite Section 5 approval. The third congressional redistricting plan contained three majority Black voting age population

districts. *Id.*, at 1366.

Subsequently, Anglo voters challenged the congressional redistricting plan as an unconstitutional racial gerrymander. The District Court concluded that the plan violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Id.*, at 1393.

This Court affirmed. The Court concluded that the motivating factor in the adoption of the third congressional redistricting plan was to maximize the number of majority Black voting age population districts. *Miller, supra*, __ U.S. at __, 115 S.Ct. at 2489. The Court equated the placement of Blacks into the predominantly minority districts as an effort to segregate voters on the basis of race. Such segregation was no different than previous efforts by States to segregate Blacks in schools, public parks, and other public areas. *Miller, supra*, __ U.S. at __, 115 S.Ct. at 2485 - 86. These previous statutory racial classifications were constitutionally suspect. Thus, such an emphasis on race required the application of the strict scrutiny standard. Under strict scrutiny, a racial classification has to be narrowly tailored to achieve a compelling state interest. The Court applied this analysis to evaluate the constitutionality of Georgia's congressional redistricting plan. *Miller, supra*, __ U.S. at __, 115 S.Ct. at 2490.

In reviewing the factual record developed in the District Court, the Court concluded that race was the motivating factor in the adoption of the third congressional plan. The sole purpose of the third redistricting plan was to satisfy the concerns expressed by the United States Attorney General in the previous letters of objection. Since the letters of objection focused on the fragmentation of Black communities throughout the State of Georgia, the legislature's responsive redistricting legislation was similarly focused on race. This racial classification triggered the application of strict scrutiny. *Miller, supra*, __ U.S. at __, 115 S.Ct. at 2489 - 90.

To satisfy strict scrutiny, the congressional redistricting plan had to be narrowly tailored to achieve a compelling state interest. The asserted state interest in this case was compliance with the Section 5 preclearance provisions of the Voting Rights Act. However, the Court did not view this interest as compelling since the United States Attorney General incorrectly applied the substantive standards of Section 5 in issuing the two letters of objection. As noted by the Court: "... [C]ompliance with federal antidiscrimination laws cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws." *Miller, supra*, __ U.S. at __, 115 S.Ct. at 2491. The Court further stated: "The congressional plan challenged here was not required by the Voting Rights Act under a correct reading of the statute." *Id.*

The Court held that the United States Attorney General did not properly interpret and apply Section 5. *Miller, supra*, __ U.S. at __, 115 S.Ct. at 2491 - 92. The United States Attorney General did not follow the retrogression standard established in *Beer v. U.S.*, 425 U.S. 130, 141, 96 S.Ct. 1357, 1363 (1976). Under this retrogression standard, a political jurisdiction subject to the Section 5 preclearance requirements cannot implement a proposed change in the law affecting voting which results in a retrogression of minority voting strength. Since there was one majority Black population congressional district in Georgia during the time period of 1980 to 1990, the first congressional redistricting plan adopted in 1991, which contained two majority Black population districts, should have received the requisite Section 5 approval. By increasing the number of minority congressional districts, there was no retrogression in minority voting strength. Accordingly, the reliance by the State of Georgia on an erroneous application of federal law by the United States Attorney General could not serve to justify the use of race as a predominating factor in the formulation of a redistricting plan. Absent a compelling state interest, the congressional redistricting plan could not withstand a constitutional challenge.

As a result of *Miller* the proscription of race based redistricting, where race is the predominant factor, only applies to those instances where the State initiates the redistricting process. Since the United States Attorney General applied an erroneous interpretation of the Voting Rights Act, there was no other justification present to provide support for the State's adoption of a race based redistricting plan, where race was the predominant factor. In *Miller*, the State of Georgia sought to maximize the number of majority Black congressional districts. Without the support of the Voting Rights Act, the State's action was reduced to a voluntary effort to improve minority representation in the United States Congress. Under these circumstances, where the State adopts an implicit racial classification and race is the predominant factor, the Equal Protection Clause requires such a classification to be narrowly tailored to further a compelling state interest.

Different considerations apply if the State adopts a race-based redistricting plan, where race is the predominant factor, in response to a violation of the Voting Rights Act. Under applicable voting rights precedent, once a violation is established, federal courts must implement a remedy which addresses the discriminatory features of a successfully challenged election system. As noted in the Senate Report accompanying the 1982 Amendments to the Voting Rights Act: "The court should exercise its traditional equitable powers to fashion the relief so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice." (Footnote omitted) Senate Report No. 97-417, 97th Congr., 2d Sess., at 31 (May 25, 1982). See *Louisiana v. U.S.*, 380 U.S. 145, 154, 85 S.Ct. 817, 822 ("We bear in mind that the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.") (1965). See also *Mississippi State Chapter, Operation Push, Inc., v. Mabus*, 932 F.2d 400, 406 (5th Cir. 1991) ("In an equity case, the nature of the violation determines the

scope of the remedy.").

In a typical voting rights case where a violation of the Voting Rights Act has been established, the political jurisdiction will be given an opportunity to propose a remedy which addresses the statutory violation. *Wise v. Lipscomb*, 437 U.S. 535, 540, 98 S.Ct. 2493, 2497 (1978) ("When a federal court declares an existing apportionment scheme unconstitutional, it is therefore, appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan."). The use of race as a predominant factor in the formulation of a proposed election plan is permitted since the remedy must cure the statutory violation as well as not violate the race sensitive prohibitions of Section 2 and Section 5. The strict scrutiny constitutional analysis does not prevent the implementation of such a proposed remedy, since the proposed remedy must be narrowly tailored to further a compelling state interest. Under the *Miller* standard, the compelling state interest in the remedy phase of a voting rights action is compliance with federal statutory and constitutional voting rights standards. Should the remedy proposed by the State prove to be either unconstitutional or in violation of either Sections 2 or 5, the Court is then required to implement a court ordered plan which provides the necessary compliance with applicable constitutional and statutory provisions. In summary, *Miller* does not prevent a federal court from implementing a race-based redistricting plan as a remedy to address either a constitutional or Voting Rights Act violation.

In the present case, this District Court noted that there was a continuing Section 5 violation. App. 2. Thus, *Miller*'s proscription against the use of race-based redistricting, where race was the predominant factor, is inapplicable where there is a Section 5 violation. Moreover, in the present case, there was never any action filed challenging the temporary election plan used in the June 6, 1995, special judicial election based upon *Miller*. And, there was no

evidentiary hearing in the District Court to assess whether the temporary election plan in fact was unconstitutional. The sole basis for the District Court's November 1, 1995, Order was its expressed reservations regarding the constitutionality of the temporary election plan. Such reservations do not rise to the level of factual findings and should not form the basis for implementing an at-large election plan which violates the Section 5 preclearance provisions. In addition such reservations should not constitute "extreme circumstances" which would permit a District Court to render an equitable remedy that violates a federal law.¹⁸

In summary, the absence of any "extreme circumstances" and the reliance on *Miller* by the District Court to order a method of election which has not received Section 5 preclearance presents a substantial question for noting probable jurisdiction.

C. The November 1, 1995, Court-Ordered Plan, does not Follow the Standards Established by this Court for Court-Ordered Plans.

There is an additional reason for this Court to conclude that the District Court's November 1, 1995, Order raises a substantial question. This Court has stated in numerous decisions that in fashioning court-ordered plans, federal courts are held to higher

¹⁸ In its previous Order of December 20, 1994, the District Court viewed the continuing violation of the Section 5 preclearance provisions as a reason for implementing a temporary election plan which received Section 5 preclearance. App. 17 - 18, n. 5 ("However, temporary relief is necessary to enable elections to go forward at this time without violating the Voting Rights Act."). The December 20, 1994, Order stands in sharp contrast to the November 1, 1995, Order where a temporary election plan incorporates an at-large election that will be implemented in violation of federal law by not securing Section 5 preclearance.

standards. *Connor v. Finch*, 431 U.S. 407, 415, 97 S.Ct. 1828, 1834 (1977) ("In such circumstances, the court's task is inevitably an exposed and sensitive one that must be accomplished circumspectly, and in a manner 'free from any taint of arbitrariness or discrimination.'"). Accordingly, this Court has required District Courts in fashioning court-ordered plans to adhere to certain requirements.

As a court-ordered plan, the District Court was required to follow the appropriate Section 5 standards. As noted in the 1975 Senate Report accompanying the extension of the 1965 Voting Rights Act: "Furthermore, in fashioning the [court ordered] plan, the court should follow the appropriate Section 5 standards, including the body of administrative and judicial precedents developed in Section 5 cases." Senate Report No. 94-295, 94th Congr., 1st Sess., at 19 (July 22, 1975). This Court in *McDaniel v. Sanchez*, 452 U.S. 130, 148, 101 S.Ct. 2224, 2235 (1981) cited with approval the aforementioned language and stated that the Committee Report was "... crystal clear on this point ..." by noting that "[t]he Committee unambiguously stated that the statutory protections are to be available even when the redistricting is ordered by a federal court to remedy a constitutional violation that has been established in pending federal litigation." Other courts have incorporated Section 5 standards in the formulation of court ordered plans. See, e.g. *Edge v. Sumter County School District*, 775 F. 2d 1509 (11th Cir. 1985). See also, *Upham v. Seamon*, 456 U.S. 37, 102 S.Ct. 1518 (1982).

As a result of this Court's decision in *Miller*, the pertinent Section 5 standard to be incorporated in a court-ordered plan is the retrogression standard.¹⁹ A court-ordered plan should not result in a

¹⁹ In fact, the District Court in its December 20, 1994, Order referred to the retrogression standard as a reason for not implementing an at-large election as part of a temporary election plan: "... [T]his court is reluctant to consider a single district, county-wide election

retrogression of minority voting strength. In the present case, the previous temporary election plan used in the June 6, 1995, special judicial election, received Section 5 preclearance on March 6, 1995. Consequently, the appropriate benchmark for evaluating any subsequent court-ordered plan is the temporary district election plan previously approved pursuant to Section 5.²⁰ When measured against the previous court-ordered plan, the November 1, 1995, court-ordered at-large election plan is retrogressive. The previous Section 5 approved plan contained two election districts each consisting of a 52% Latino eligible voter population.²¹ The November 1, 1995, court-ordered election plan consists of a single county-wide election district where the Latino eligible voter population is 17% of the

plan as a temporary remedy in light of the supported stipulation that such a plan would be retrogressive in terms of Latino voting strength." App. 17, n. 4.

²⁰ The federal regulations governing the administration of Section 5 state that the appropriate comparison is the "... last legally enforceable practice or procedure used by the jurisdiction." 28 C.F.R. § 51.54 (b). Clearly, the "last legally enforceable" plan was the election plan used in the June 6, 1995, special judicial election, which received Section 5 preclearance. *See also State of Texas v. United States*, 785 F.Supp. 201, 204 - 205 (D.D.C. 1982) (court-ordered temporary plan is appropriate comparison); *State of Mississippi v. Smith*, 541 F.Supp. 1329, 1333 (D.D.C. 1982) (new plan must not result in retrogression when compared to court-ordered plan), *appeal dismissed*, 461 U.S. 912, 103 S.Ct. 1888 (1983); *State of Mississippi v. United States*, 490 F.Supp. 569, 582 (D.D.C. 1979) (court-ordered plan is the new benchmark for comparison), *sum. aff'd*, 444 U.S. 1050, 100 S.Ct. 994 (1980).

²¹ According to a population analysis conducted by Monterey County, two of the municipal court election divisions each consisted of a 52 % Latino eligible voter population. App. 89.

eligible voter population for the County. App. 91. A reduction in Latino eligible voter population from 52% to 17% constitutes retrogression.

The District Court's November 1, 1995, at-large election plan violates another standard for court-ordered plans repeatedly reaffirmed by this Court. When federal courts must fashion a court-ordered election plan, single member districts are to be preferred over at-large election systems. *See, e.g., Wise, supra*, 437 U.S. at 540 & 541, 98 S.Ct. at 2497 & 2498 ("Among other requirements, a court-drawn plan should prefer single-member districts over multimember districts, absent persuasive justification to the contrary."). The District Court's expressed reservation regarding the constitutionality of the temporary district election plan cannot rise to the level of a persuasive justification justifying the use of an at-large election system. As previously noted, an expressed reservation is not tantamount to a judicial finding of unconstitutionality.

The use of an at-large election in a court-ordered plan is also unwarranted in view of this Court's observation that such election systems can have the potential to discriminate against minority voting strength:

"Voters who are members of a racial minority might well be in the majority in one district, but in a decided minority in the county as a whole. This type of change could therefore nullify their ability to elect the candidate of their choice just as would prohibiting some of them from voting."

Allen, supra, 393 U.S. at 569, 89 S.Ct. at 833 - 834.

To conclude, the District Court's implementation of an at-large election system and its disregard of the Section 5 retrogression standard is inconsistent with the standards established by this Court for court-ordered plans and for this reason the November 1, 1995, Order raises a substantial question warranting the noting of probable jurisdiction.

Conclusion

The District Court's November 1, 1995, Order raises substantial questions regarding whether a Section 5 violation can be cured by the implementation of a court-ordered election plan which incorporates a method of election that also violates Section 5. Accordingly, probable jurisdiction should be noted and the Order should be reversed to enforce the Section 5 preclearance provisions of the Voting Rights Act in Monterey County, California.

Respectfully submitted,

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Index to Appendix*

1. Order Modifying Injunction filed
November 1, 1995 App. 1
 2. Order Enjoining Elections Pending
Preclearance of Permanent Plan Except
for Court-Ordered Special Election
in 1995 filed December 20, 1994 App. 10
 3. Order Denying Motion for
Reconsideration filed November
30, 1995 App. 25
 4. Notice of Appeal to the Supreme
Court of the United States filed
November 30, 1995 App. 26
 5. Administrative Ruling from the
United States Attorney General dated
November 13, 1995 App. 28
- Attachment A Monterey County Section
5 Submission, December 29, 1994 App. 34
- Attachment B Monterey County Section
5 Submission, January 10, 1995 App. 44
- Attachment C United States Attorney
General Letter of Preclearance of
Temporary Election Plan, March 6, 1995 App. 53

* Originals have not been modified to correct typographical and other types of errors.

**Index to Appendix
Cont'd**

Attachment D Monterey County Section 5 Submission, March 6, 1995	App. 56
Attachment E Section 5 Submission of State Statutes	App. 65
Attachment F United States Attorney General Correspondence to Chief, California Elections Division, March 12, 1990	App. 81
Attachment G United States Attorney General Correspondence to Clerk to the Board of Supervisors, Monterey County, March 12, 1990	App. 83
6. 42 U.S.C. § 1973 c	App. 85
7. 28 C.F.R. § 51.54	App. 87
8. Monterey County Municipal Court Districts Summary Table Plan 7B	App. 88
9. Stipulations of Plaintiffs and Monterey County Hearing to Show Cause	App. 92
10. Excerpt of Transcript, September 28, 1995	App. 109

App. b

App. 1

Filed
Nov. 1, 1995
Richard W. Wieking
Clerk, U.S. District Court
Northern District of California
San Jose

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

VICKY M. LOPEZ, CRESCENCIO
PADILLA, WILLIAM A. MELENDEZ,
JESSE G. SANCHEZ, and DAVID
SERENA,

Plaintiffs,

v.

MONTEREY COUNTY, CALIFORNIA,
Defendant.

STATE OF CALIFORNIA,
Intervenor-Defendant.

NO.
C-91-20559-RMW
Voting Rights Action
Three Judge Court

ORDER
MODIFYING
INJUNCTION

Background

On December 20, 1994 this court ordered the County of Monterey to hold a special election in 1995 for municipal court judges pursuant to a court-ordered, emergency, interim election plan.¹ The

¹ The order was clarified on January 10, 1995 to make clear that the order required a primary election with run-offs thereafter, if necessary.

court otherwise enjoined the election of municipal court judges pending the adoption and preclearance of a permanent election plan which complies with the Voting Rights Act and State law. The special election took place on June 6, 1995 and the terms of those elected stand to expire pursuant to the December 20, 1994 order in January of 1997. Monterey County has not yet been able to implement a permanent election plan. Therefore, the court faces the difficult question of what to do now.

Position of Parties

The plaintiffs want the court to implement a permanent election plan and to continue in the meantime the implementation of the plan utilized in the June 6, 1995 special election. The County requests that the court extend the terms of those elected, so that it can preclear and judicially validate a permanent plan before another election. The State urges the court to dismiss this Section 5 action as moot because the non-precleared consolidation ordinances were superceded by state law. If the court will not dismiss the action as moot, the State wants: (1) to be joined as a necessary party; (2) to have vacated the court's March 31, 1993 order finding that the County's consolidation ordinances were not precleared; (3) to litigate the merits of the preclearance issues; and (4) to allow county-wide elections in the meantime. Judge Sillman, the current presiding judge of the municipal court, urges that the court order county-wide elections to go forward in March of 1996 as an interim plan and that those elected remain in office for regular six year terms.

Analysis

The court finds this case to be one with no easy solution. We are faced with a Section 5 violation.² No permanent plan can be in

² The State appears to believe there has been no Section 5 violation that affects the County's ability to hold county-wide judicial elections. At this point the court is not persuaded by the State's position, but the State can now seek to show that the County is merely administering a state law calling for county-wide elections and, therefor, no preclearance requirement is involved.

place for a March election. A return to the status quo that existed before the enactment of the consolidation ordinances is not legal, feasible or desired. The Supreme Court in Miller v. Johnson, 115 S.Ct. 2475 (1995), has cast substantial doubt upon the constitutionality of extending the duration of the previously ordered emergency, interim plan, as that plan used race as a significant factor in dividing the County into election areas. Therefore, the court is concerned that extending the terms of those elected would be inappropriate. Under the circumstances, the court concludes that it should allow a county-wide election of municipal court judges in the general election in 1996 but enjoin elections thereafter pending preclearance of a permanent plan that complies with the Voting Rights Act and state law.

The court recognizes that now permitting an election on a county-wide basis raises some legitimate concerns. Although the court has not accepted the stipulation between the County and plaintiffs that the County Board of Supervisors "is unable to establish that the Municipal Court Judicial Court Consolidation Ordinances. . . did not have the effect of denying the right to vote to Latinos in Monterey County due to the retrogressive effect several of these ordinances had on Latino voting strength...." (Monterey County, Cal., Resolution 94-107), the court cannot overlook that stipulation in fashioning a temporary solution. However, this litigation is not a Section 2 proceeding. Further, neither the plaintiffs nor the County suggest that there is any evidence of purposeful discrimination in the enacting of the consolidation ordinances. Finally, Miller raises substantial doubt as to whether legislative division into race based districts or election areas can ever withstand constitutional scrutiny.

Just as the State may not, absent extraordinary justification, segregate citizens on the basis of race in its public parks, New Orleans City Park Improvement Assn. v. Detiege, 358 U.S. 54, 79 S.Ct. 99, 3 L.Ed.2d 46

(1958) (*per curiam*), buses, Gayle v. Browder, 352 U.S. 903, 77 S.Ct. 145, 1 L.Ed.2d 114 (1956) (*per curiam*), golf courses, Holmes v. Atlanta, 350 U.S. 879, 76 S.Ct. 141, 100 L.Ed. 776 (1955) (*per curiam*), beaches, Mayor and City Council of Baltimore v. Dawson, 350 U.S. 877, 76 S.Ct. 133, 100 L.Ed. 774 (1955) (*per curiam*), and schools, Brown, supra, so did we recognize in Shaw that it may not separate its citizens into different voting districts on the basis of race. The idea is a simple one: "At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens 'as individuals, not "as simply components of a racial, religious, sexual or national class." ' " Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 602, 110 S.Ct. 2997, 3028, 111 L.Ed.2d 445 (1990) (O'CONNOR, J., dissenting) (quoting Arizona Governing Comm. for Tax Deferred Annuity and Deferred Compensation Plans v. Norris, 463 U.S. 1073, 1083, 103 S.Ct. 3492, 3498, 77 L.Ed.2d 1236 (1983); cf. Northeastern Fla. Chapter. Associated Gen. Contractors of America v. Jacksonville, 508 U.S. ___, ___, 113 S.Ct. 2297, 2303, 124 L.Ed.2d 586 (1993) (" 'injury in fact' " was "denial of equal treatment ... not the ultimate inability

to obtain the benefit"). When the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, "think alike, share the same political interests, and will prefer the same candidates at the polls." Shaw, supra, at ___, 113 S.Ct., at 2827; see Metro Broadcasting, supra at 636, 110 S.Ct., at 3046 (KENNEDY, J., dissenting). Race-based assignments "embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts--their very worth as citizens--according to a criterion barred to the Government by history and the Constitution." Metro Broadcasting, supra, at 604, 110 S.Ct., at 3029 (O'CONNOR, J., dissenting) (citation omitted); see Powers v. Ohio, 499 U.S. 400, 410, 111 S.Ct. 1364, 1370, 113 L.Ed.2d 411 (1991) ("Race cannot be a proxy for determining juror bias or competence"); Palmore v. Sidoti, 466 U.S. 429, 432, 104 S.Ct. 1879, 1881, 80 L.Ed.2d 421 (1984) ("Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category"). They also cause society serious harm. As we concluded in Shaw:

"Racial classifications with respect to voting carry particular dangers. Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire. It is for these reasons that race-based districting by our state legislatures demands close judicial scrutiny." *Shaw, supra*, at ___, 113 S.Ct., at 2832.

Miller, 115 S.Ct. at 2486.

Whether race based election areas can withstand constitutional scrutiny is particularly doubtful when, as here, the legislative body is dealing with the election of judges who serve the entire County and no claim is made that the County itself was configured to deprive any racial or ethnic group of voting power. As pointed out above, *Miller* cautions that "[w]hen the state assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a

particular race, because of their race, 'think alike, share the same political interests, and will prefer the same candidates at the polls.' (citation omitted)." *Id.*

A county-wide election system does not assume that voters of a particular race or ethnicity will vote for the same candidates. It allows each voter one vote for each of the judicial offices. It makes the judges elected responsive to all citizens and avoids any risk of pressure on judges to respond to particular electoral constituents. *See, Nipper v. Smith*, 39 F.3d 1494, 1542-1547 (11th Cir. 1994).

Plaintiffs and the County contend that a county-wide voting plan cannot be imposed as an interim plan because it would be retrogressive in comparison to the interim, emergency plan implemented by the County after the court's December 20, 1994 order. (The appropriate retrogression comparison "...shall be with the last legally enforceable practice or procedure used by the jurisdiction." 28 C.F.R. § 51.54(b)). The court doubts whether the prior interim plan can be considered "legally enforceable" within the meaning of the regulation, because it suspended otherwise applicable provisions of state law and was adopted only on an emergency basis. Further, given the reasoning of *Miller*, the court cannot say that a county-wide election plan is necessarily unlawfully retrogressive in comparison with the prior plan or the system in effect prior to the consolidation ordinances.

The court also has considered the fact that a county-wide election system was the legislative choice of the citizens prior to the filing of this lawsuit. The court certainly recognizes its obligation to protect minority voting rights from unconstitutional action of the majority. However, the court has been presented with no interim plan that it finds more protective of minority voting rights as defined in *Miller* than the county-wide election plan in force at the time this Section 5 lawsuit was filed.

Since this case is not a Section 2 case and since the County, to its credit, through its Board of Supervisors, still wants to enact an election plan that complies with the Voting Rights Act and state law, the court will defer holding any hearing on a permanent plan. The

court also reconsiders its prior decision that the State should not be joined as an indispensable party. Since the State now argues that "in conducting municipal court elections, the County is not 'administering' its consolidation ordinances at all, but is instead 'administering' a *state statute* that defines the municipal court district to encompass the entire county," (State's Status Conference Memorandum, page 2, lines 12-14), the State clearly must be brought into this action in order to bring about a complete resolution of the issues. If the State believes that the County is only administering a State statute and that the failure to preclear the consolidation ordinances is of no significance, it can seek to lift the injunction and have this Section 5 litigation dismissed.

Order

Pursuant to its equitable power to effect a remedy, and for the reasons discussed above, the court modifies its previously issued injunction to allow the county-wide election of municipal court judges at the general election in 1996. The injunction remains in effect thereafter pending preclearance of a permanent plan that complies with the Voting Rights Act and state law. The terms of those elected will be for the normal six year term. All parties have an interest in stability of the court pending the implementation of a permanent election plan.

The court recognizes that the election schedule will have to be shortened somewhat to allow elections in March of 1996. However, the court believes the schedule can be shortened without unduly prejudicing any candidate. The County is hereby authorized to abbreviate the periods in its election calendar to allow all pre-election requirements to be fulfilled before the March 26, 1996 election.

The court vacates its order of March 31, 1993 to the extent it denies the County's motion to join the State as an indispensable party and hereby joins the State.

The court also orders the parties to submit reports by September 6, 1996 outlining the progress that has been made in obtaining a permanent legislative solution.

DATED: 11/1/95

/s/

RONALD M. WHYTE
United States District Judge
On Behalf of the Panel

Filed
 December 20, 1994
 Richard W. Wieking
 Clerk, U.S. District Court
 Northern District of California
 San Jose

**IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA**

VICKY M. LOPEZ, CRESCENCIO
 PADILLA, WILLIAM A. MELENDEZ,
 JESSE G. SANCHEZ, and DAVID
 SERENA,

Plaintiffs,

v.

MONTEREY COUNTY,
 CALIFORNIA,

Defendant.

NO.
 C-91-20559-RMW
 (EAI)
 ORDER ENJOINING
 ELECTIONS
 PENDING
 PRECLEARANCE OF
 PERMANENT PLAN
 EXCEPT FOR
 COURT-ORDERED
 SPECIAL
 ELECTION IN 1995

I. INTRODUCTION

This is a case in which the plaintiffs challenged the implementation of six Monterey County ordinances on the ground that they were not precleared as required by the Voting Rights Act, 42 U.S.C. § 1973c. The ordinances consolidated two municipal and seven justice court districts into a single municipal court district with the judges being elected at large from the entire county. The court previously determined that the ordinances were subject to preclearance and that preclearance had not been obtained. The County

then sought preclearance but discontinued its effort stipulating that it could not establish that the consolidation ordinances did not have the effect of denying the right to vote to Latinos as a result of the retrogressive effect that consolidation had on Latino voting strength. Pursuant to this court's order which included an injunction prohibiting an election pending adoption and preclearance of an election plan,¹ the County next attempted to secure an amendment to the California Constitution regarding the configuration of districts, so it could implement an election plan that complied with the Voting Rights Act and did not violate any provision of California law. The County was unsuccessful. The question now facing the court is what remedy, under the circumstances, is appropriate.

**II. SUMMARY OF CURRENT ISSUE BEFORE COURT
 AND DECISION THEREON**

Plaintiffs and Monterey County urge the court to allow elections to take place under a plan that would involve maintaining the current single, county-wide district but with election areas. This plan would eliminate linkage between the judges' jurisdictional and electoral bases and would split the City of Salinas into two areas for election purposes. However, it would allow the County to continue its current administrative scheme for the county-wide operation of the municipal courts. As an alternative, plaintiffs and the County ask that the court authorize the County to implement a plan which would include more than one district and would split the City of Salinas.²

¹ The County has chosen not to attempt to obtain preclearance of a plan that potentially violates state law in any way without this court's permission, apparently believing that any attempt to do so would result in preclearance rejection or be futile.

² Return to the last lower court district plan in effect before passage of the subject ordinances was conceded by plaintiffs and the County to be impractical.

This plan would require substantial administrative changes in the operation of the courts. The State of California and Municipal Court Judge Fields, both of whom have intervened, object to the proposals made as unnecessarily intrusive on state interests.

For the reasons set forth below, the court hereby continues its injunction prohibiting Monterey County from holding elections for municipal court judges pending adoption and preclearance of a permanent plan, except the court orders that a special election be held in 1995 to protect the rights of the citizens to elect judges while a permanent legislative solution is being developed and precleared. The court-ordered special election will be held pursuant to an election area plan, specifically the "Municipal Court Division Plan" as described in the Second Stipulation presented to the court by plaintiffs and the County on January 13, 1994. The terms of the judges elected will expire on the first Monday in January 1997.

III. BACKGROUND

Prior to 1968, Monterey County had two municipal and seven justice court districts. By ordinances enacted by the County between 1968 and 1983, those districts were consolidated so as to provide for one municipal court district with judges elected at large from the entire county. The consolidation ordinances were subject to review under Section 5 of the Voting Rights Act and, on September 6, 1991, plaintiffs herein filed this Section 5 enforcement action seeking declaratory and injunctive relief requiring the County to seek preclearance of the ordinances before enforcing them further. Pursuant to 28 U.S.C. § 2284, the case was assigned to this three-judge court. On March 31, 1993, this court found that the ordinances did, in fact, require preclearance, that such preclearance had not been obtained, and that the ordinances could not be enforced without preclearance. In response to the court's order, the County, on August 10, 1993, filed a declaratory judgment action in the United States District Court for the District of Columbia to obtain after-the-fact preclearance of the ordinances. County of Monterey v. United States of America, No.

93-1639 (D.D.C. filed Aug. 10, 1993). That action was subsequently dismissed upon a stipulation that "[t]he Board of Supervisors is unable to establish that the Municipal Court Judicial Court Consolidation Ordinances adopted by the County between 1968 and 1983 did not have the effect of denying the right to vote to Latinos in Monterey County due to the retrogressive effect several of these ordinances had on Latino voting strength in Monterey County." Monterey County, Cal., Resolution 94-107 (March 15, 1994).

Monterey County and plaintiffs then agreed to the implementation of an "Election Area Plan" for the election of municipal court judges and requested that this court order the County to adopt the system. The Election Area Plan consisted of seven election areas which were specific geographic areas in which only the residents could vote. The areas were to be used solely for election purposes and there would remain only one county-wide municipal court district for all other purposes. The parties acknowledged that the plan might conflict with Article VI, Section 16(b) of the California Constitution, since it removed the linkage between a judge's electoral and jurisdictional bases. They asked the court to authorize the County to adopt the plan and the County stated that it would then seek preclearance. The State of California asked to intervene and objected to the issuance of an order authorizing the plan. The court, by order dated December 22, 1993, allowed the State to intervene and declined without prejudice to approve the proposed Election Area Plan because it was not satisfied that a plan necessarily had to conflict with the California Constitution in order to comply with the Voting Rights Act. Judge Michael S. Fields, a municipal court judge, was also allowed to intervene in his personal capacity.

On January 13, 1994 the County submitted a new stipulation and proposed order in response to the court's order of December 22, 1993. The new proposed plan, entitled "Municipal Court Division Plan," called for four divisions. The divisions, like the areas in the previously proposed Election Area Plan, were specific geographic areas in which only the residents could vote. The divisions were to be used solely for election purposes and not for assignment of cases,

court locations, or any other purpose. Plaintiffs and the County suggested that the Division Plan did not violate the state constitution, but requested the court to approve it even if it felt otherwise. The State and Judge Fields objected to acceptance of the Division Plan on the basis, among others, that it violated Article VI, Section 16(b) of the California Constitution, which requires that judges be elected in their counties or districts. In its order dated February 28, 1994 the court again stated that it was not satisfied that an election plan had to conflict with the California Constitution in order to meet the requirements of the Voting Rights Act and implicitly held that the Division Plan in fact did so conflict. The court further ordered that the County submit for preclearance an election plan that complied with the Voting Rights Act and all applicable provisions of the California Constitution and state law, or show cause why it could not do so.

On March 31, 1994, in a hearing to show cause, the County explained why it could not submit the requested plan for preclearance and referred to Board of Supervisors' Resolution 94-107, which made certain findings supporting the Board's conclusion that "[t]he Board of Supervisors is unable to devise or prepare any plan for the election of municipal court judges in Monterey County that does not conflict with at least one state law and still comply with the Voting Rights Act." On June 1, 1994 the court issued its order enjoining Monterey County from holding elections for municipal court judges pending adoption and preclearance of a plan for their election. The County was ordered to take the necessary steps to obtain changes in existing state law and county ordinances to effectuate such a plan. The parties were also ordered to appear on November 3, 1994 to report on their progress.

Following the court's order of June 1, 1994, the County made a good faith effort to secure passage of an amendment to the California Constitution regarding the configuration of municipal court districts in Monterey County. The efforts were unsuccessful for reasons that appear unrelated to any controversy regarding the proposed amendment. Plaintiffs and Monterey County now urge the court to allow elections to take place under the Municipal Court

Division Plan which they had proposed to the court on January 13, 1994. As an alternative, they ask that the court authorize the County to implement a plan which would include districts that split cities.

IV. ANALYSIS

The final step for the three-judge court is to determine "what remedy is appropriate." Section 5 contemplates injunctive relief, which is by its nature equitable. Moreover, the Supreme Court has indicated that the three-judge court has some limited discretion in fashioning a remedy by directing that the court must fashion an "appropriate" remedy. *See e.g., Perkins v. Matthews*, 400 U.S. 379, 441, 91 S.Ct. 431, 441, 27 L.Ed. 2d 476 (1971) (questions of appropriate remedy for district court)

Brooks v. State Board of Education, 775 F. Supp. 1470, 1482 (S.D. Ga. 1989).

Since the County did not obtain preclearance for the consolidating ordinances it enacted after 1968, this court must enjoin elections under those ordinances. The question that remains then is how, under the existing circumstances, should the court further "fashion an appropriate remedy" under its equitable powers. A return to the system that was last in effect before the adoption of the unprecared ordinances is impractical and no party seems to seriously advocate that even as an interim solution.³ Continuance of the

³ The last lower court district plan in effect at the time Monterey County became a covered jurisdiction consisted of two municipal districts, with two municipal court judges in each such district, and seven justice court districts with one justice court judge in each such district. Monterey County, Cal., Ordinance 1347, as amended by Ordinance 1597. In addition to resolving problems associated with the fact that seven of the districts were justice court

injunction without any election pending implementation of a precleared system would deprive the voters of their right to elect judges. Obviously, the court cannot overlook the importance of the citizens' right to elect judges while a permanent legislative solution is being developed and precleared. A memorandum dated January 11, 1994 from the Registrar of Voters shows that seven of the ten judicial offices would have been up for election in 1994 but for the preclearance problem and the court's injunction. As noted in Wise v. Lipscomb, 437 U.S. 535, 540, 98 S. Ct. 2493, 2497 (1978) (citation omitted):

Legislative bodies should not leave their reapportionment tasks to the federal courts; but when those with legislative responsibilities do not respond, or the imminence of a state election makes it impractical for them to do so, it becomes the "unwelcome obligation" of the federal court to devise and impose a reapportionment plan pending later legislative action.

Therefore, the court concludes that its remedy must allow for an election pending the implementation of a permanent legislative solution. See Berry v. Doles, 438 U.S. 190, 98 S.Ct. 2692 (1978) (suggesting that a special election could be considered by the district court if Section 5 approval was not obtained for a voting change). The interim election plan shall call for a special election in 1995 that is not unduly intrusive on state law and policies and not unreasonably disruptive to the County's interests in effective and efficient delivery of municipal court services. Under the Supremacy Clause, the

districts and the total number of municipal court judges is now ten, the districts would have to wrestle with the fact that several of the districts would be very small. This would undoubtedly result in administrative problems including frequent assignment of judges to districts other than their own.

implementation of relief for a violation of the Voting Rights Act must take precedence over enforcement of state law that stands in the way of effective relief. See Katzenbach v. Morgan, 384 U.S. 641, 646-47 (1966). The terms of those elected, however, will expire on the first Monday in January 1997, so that the County understands that it must have a permanent solution in effect by the time of the next general election or it will risk being without judges.

The court is satisfied that there are only two viable alternatives for an interim, emergency election plan.⁴ One is to authorize the County to implement an interim plan which includes districts that split the City of Salinas. This would require the court to "suspend" application of Article VI, Section 5 of the California Constitution in order to allow compliance with the Voting Rights Act. This approach is favored by the State and Judge Fields over the second alternative discussed below, although the State contends that there is no basis for the court to relieve the County from any of the state's constitutional restrictions.⁵

⁴ The court does not imply that the consolidation ordinances which the court found had not been precleared necessarily resulted in a voting procedure that violates Section 2 of the Voting Rights Act (42 U.S.C. 1973(a)), i.e. that the voting procedure results in a denial of the right of any citizen to vote on account of race or color. While evidence has been offered to that effect by the stipulation between plaintiffs and defendant County, this court has not made such a finding. However, the court is reluctant to consider a single district, county-wide election plan as a temporary remedy in light of the supported stipulation that such a plan would be retrogressive in terms of Latino voting strength.

⁵ The State's brief is not clear as to whether the State believes that the court has no basis for relieving the County from any of the State's constitutional restrictions on a temporary basis or whether it only objects to the court's attempting to give some sort of permanent authorization to violate state law. The court agrees with the State that

The other alternative is to permit the County to implement a temporary election plan that is predicated on the Municipal Court Division Plan such as described in the Second Stipulation submitted to the court in January 1994. Under this plan, a judge's jurisdictional and electoral bases would not be coterminous. This plan would require the "suspension" of Article VI, Section 16(b) of the California Constitution. It would also require the splitting of the City of Salinas.

The court has considered in analyzing alternatives for an interim plan the recent en banc decision in Nipper v. Smith, No. 92-2588, 1994 WL 642754 (11th Cir. Dec. 2, 1994), in which black voters and an association of black attorneys contended that the use of at-large elections in trial court jurisdictions diluted the voting strength of the black minority in violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973(a). The court found that plaintiffs had established vote dilution, but that none of the remedies sought provided an objectively reasonable and workable solution to the vote dilution and that they would actually undermine the court's ability to administer justice. *Id.* at *47-51. The proposed remedies included alternatives of electoral subdistricts and the creation of new circuits which would contain sufficient black voters to enable them to elect a

any attempt to give the County approval to violate existing state law on a permanent basis is, at this time, beyond the scope of this court's function. However, temporary relief is necessary to enable elections to go forward at this time without violating the Voting Rights Act. The State's suggestion that an election with shortened terms of office coupled with periodic reports to the court would be a less drastic solution does not address the question of under what plan such an election would take place. As noted earlier, no party seems to question the County's assertion that it is not now feasible to return to the status quo ante. In fact, any attempted return to the districts existing in 1968, the date of the last lawful judicial district map adopted by the Board of Supervisors, would result in judges being frequently and regularly assigned outside their districts.

candidate of their choice.

In the present case, the court is not faced with deciding whether a voting scheme violates Section 2. It is presented with the problem of what interim solution should be implemented pending the legislative enactment of a precleared voting plan. Evidence has been offered that Latino voters have had their voting strength diluted and, therefore, a special election under an at-large system would probably preclude them from electing any judge of their choice. On the other hand, persuasive evidence has not been offered that the court's ability to administer justice would be undermined by the two alternatives under consideration. The court, however, acknowledges that ultimately an at-large system or a system different from either of the two proposed alternatives may prove, under the totality of circumstances, to be the best judicial election scheme.

The prohibition against dividing a city into more than one district is set forth in Article VI, Section 5(a) of the California Constitution which provides in part: "Each county shall be divided into municipal court and justice court districts as provided by statute, but a city may not be divided into more than one district."⁶ The State's interest in preventing the division of cities does not appear to reflect any compelling state policy. In fact, the City of San Diego has been specifically authorized to divide cities if "the Legislature determines that unusual geographic conditions warrant such division." Cal. Const. art. VI, § 5(b). However, the creation of a multidistrict plan in Monterey County would require substantial administrative changes which would necessarily include reassignment of personnel, setting up new administrative procedures and the like. Further, these changes might be in effect for only the time period preceding the adoption of a permanent precleared plan. The court, therefore, finds that while a one-time, temporary suspension of the application of the city splitting prohibition would not interfere with a compelling state interest,

⁶ California Government Code Section 71040 similarly prohibits the dividing of a city so that it lies within more than one district.

implementation of a temporary multidistrict municipal court district plan would significantly interfere with the County's ability to provide uninterrupted efficient and effective delivery of municipal court services.

The proposed division plan allows the County to continue administratively operating the municipal courts in the county as it currently does. The problem, of course, is that the plan involves a separation of the electoral and jurisdictional bases of municipal court judges. Article VI, Section 16 provides that "[j]udges of [municipal] courts shall be elected in their counties or districts at general elections." Therefore, this division or election area plan denies residents of the Monterey County Municipal Court District the right to vote for some of the judges in the county-wide district. At first glance, this would seem to constitute a substantial intrusion on state interests. As the State points out, historically, municipal and small claims courts have been intended to be responsive to the ordinary affairs of the citizens of their districts.⁷ Several courts have noted that linkage between electoral and jurisdictional bases is a recognized state interest: "The overwhelming preservation of linkage in states that elect their trial court judges demonstrates that district-wide elections are integral to the judicial office and not simply another electoral alternative." League of United Latin American Citizens v. Clements, 999 F.2d 831, 872 (5th Cir. 1993); see also Nipper v. Smith, 1994 WL 642754 at *47-51.

⁷ The State also contends that the implementation of the division plan proposed by plaintiffs would raise many questions about the authority and status of "election area" judges. These concerns seem somewhat unfounded, since the proposal only concerns the election process and does not otherwise attempt to affect the authority and status of the judges. Further, the plan is not being implemented as a legislative solution to the existing Voting Rights Act problem facing the County, but is rather being implemented by the court as an interim, emergency solution to insure the voters' right to elect municipal court judges.

However, on closer analysis the intrusion on state law does not seem as substantial as it initially appears. The process of municipal courts extends throughout the state, Cal. Civ. Proc. Code § 84, and, therefore, the jurisdiction of a municipal court judge extends outside the geographic limits of the judge's district. In addition, Article VI, Section 15 of the California Constitution provides that "[a] judge eligible for municipal court service may be assigned by the Chief Justice to serve on any court." This provision authorizes the Chief Justice to assign municipal court judges from one municipal court district to serve in other municipal court districts. Sometimes the Chief Justice issues "blanket assignments." As noted in the 1994 Annual Report of the Judicial Council of California:

Blanket (within county) and reciprocal (between counties) assignments are issued each year by the Chief Justice to permit judges of one court to sit as judges of another court within their county or in a neighboring county. A total of 193 blanket assignments and 73 reciprocal assignments were issued during fiscal year 1992-93.

Judicial Council Report at 167.

These facts show that in practice the rights of nonresidents are often judged by resident judges. Also, nonresident judges are frequently assigned to other districts. Therefore, as a practical matter, linkage between a judge's electoral and jurisdictional bases cannot be considered an overwhelmingly strong public policy. The district court in Cousin v. McWhorter, 840 F. Supp. 1210, 1220 (E.D. Tenn. 1994) so recognized in holding that the use of a single, at-large district for election of voters violated the Voting Rights Act:

The Court finds that this policy underlying the practice of county wide election for judges is tenuous if a totality of circumstances test is utilized. Any voter in any number of different situations may be subjected

to the jurisdiction of a judge for which they had no opportunity to vote such as a federal judge, or a judge in another county or another state. Judges routinely respond to litigants who will not have the opportunity to vote for the judge in an election. There is never a guarantee that jurisdiction and electorate will be coextensive.

The dissenting judges in *Nipper* also questioned the importance of linkage as a component of state policy. *Nipper v. Smith*, 1994 WL 642754 at *61-62. Although an election division plan as proposed will undoubtedly cause more parties to have their cases heard by judges who did not elect them, there is no strict linkage presently existing in California courts.

The concern of the State and Judge Fields that an election area plan may violate the Equal Protection clause of the Fourteenth Amendment seems unfounded. No case has been cited which comes to that conclusion. However, several courts have remedied violations of Section 2 of the Voting Rights Act in cases involving at-large or circuit-wide judicial election systems by ordering the use of election sub-districts that are not coterminous to the jurisdictional bases of the elected judges. See *Clark v. Roemer*, 777 F. Supp. 471 (M.D. La. 1991), *appeal dismissed*, 958 F.2d 615 (5th Cir. 1992) (Louisiana trial and appellate courts); *Martin v. Mabius*, 700 F. Supp. 327 (S.D. Miss. 1988) (circuit, chancery, and some county court judges); and *Hunt v. Arkansas*, No. 89-406 (E.D. Ark. Nov. 7, 1991) (consent decree concerning trial courts of general jurisdiction).

The court, therefore, concludes that the Municipal Court Division Plan, as an interim plan, minimally intrudes on state interests and enables the County to maintain its current administrative operation of the municipal courts while it is working for a permanent legislative solution to its Voting Rights Act problem.⁸ The calendar

⁸ The court does not intend by this order to pass judgment on the merits of the proposed election area plan as a potential permanent

for such an election is set forth in the memorandum of the Registrar of Voters to County Counsel dated October 4, 1994 (Appendix A).

Although a federal court's authorization of the emergency, interim use of a court-created election plan does not normally require preclearance, see 28 C.F.R. § 51.18(c), such preclearance is required when the covered jurisdiction submits a proposal reflecting its policy choices irrespective of what constraints have limited the choices available to it. *McDaniel v. Sanchez*, 452 U.S. 1128, 101 S. Ct. 2224 (1981). Since the court-ordered plan here is based upon a proposal submitted by the County, the County may be statutorily required to seek preclearance of the plan, even though it is only an interim, court-directed plan. This should present no obstacle, however, as the Attorney General is apparently prepared to give expedited approval. *Amicus Curiae* Brief of the United States dated May 13, 1994, at 9 n. 10.

V. ORDER

1. Monterey County is ordered to develop a permanent plan for the election of municipal court judges which complies with the Voting Rights Act and does not violate state law. The County shall take any steps required to obtain changes in existing state law and county ordinances.

2. Monterey County is hereby enjoined from holding elections for municipal court judges pending adoption and preclearance of a permanent plan or further order of this court.

3. Notwithstanding paragraph 2 above, the County shall implement as a court-ordered, emergency, interim plan for a special election in 1995 the election plan set forth in the Second Stipulation presented to the court by Plaintiffs and the County on January 13, 1994 with a new election calendar as set forth in the memorandum of the Registrar of Voters to the County Counsel dated October 4, 1994.

plan. That judgment is best left to legislators.

App. 24

The terms of office of those elected pursuant to the interim plan shall expire on the first Monday in January 1997. The court foresees that a permanent, precleared plan will be implemented in time for the next general election in 1996. The court retains jurisdiction over the implementation of the court-ordered, interim plan.

Dated: 12/20/94

/s/

Ronald M. Whyte
United States District Judge
On Behalf of the Panel

App. 25

Filed
Nov. 30, 1995
Richard W. Wieking
Clerk, U.S. District Court
Northern District of California
San Jose

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

VICKY M. LOPEZ, CRESCENCIO
PADILLA, WILLIAM A. MELENDEZ,
JESSE G. SANCHEZ, and DAVID
SERENA,

Plaintiffs,

v.

MONTEREY COUNTY, CALIFORNIA,
Defendant.

STATE OF CALIFORNIA,
Intervenor-Defendant.

NO.
C-91-20559-RMW
Voting Rights Action
Three Judge Court

**ORDER
DENYING MOTION
FOR
RECONSIDERATION**

The motion for reconsideration is denied. The court's Order Modifying Injunction filed November 1, 1995 was not based on any assumption that county-wide elections for municipal court judges had been precleared. The order reflects what the court believes is the appropriate temporary, equitable remedy pending preclearance of a plan that complies with the Voting Rights Act and does not violate state law.

DATED: November 30, 1995

/s/

JAMES WARE
United States District Judge
For the Panel

App. 26

Joaquin G. Avila
Parktown Office Building
1774 Clear Lake Avenue
Milpitas, California
95035-7014
(408) 263-1317
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Prof. Barbara Y. Phillips
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Number 111135

Filed

Nov. 30 2:12 p.m. '95
Richard W. Wieking
Clerk, U.S. District Court
Northern District of California
San Jose

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

VICKY M. LOPEZ, CRESCENCIO
PADILLA, WILLIAM A. MELENDEZ,
and DAVID SERENA,
Plaintiffs,

v.

MONTEREY COUNTY, CALIFORNIA,
STATE OF CALIFORNIA,
Defendants,
STEPHEN A. SILLMAN
Intervenor.

Civil Action No.
C-91-20559-RMW
(EAI)
Voting Rights Action
Three Judge Court

Circuit Judge Mary M.
Schroeder
District Judge James
Ware
District Judge Ronald
M. Whyte

**NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES**

App. 27

Notice is hereby given that Vicky M. Lopez, Crescencio Padilla, William A. Melendez, and David Serena, the Plaintiffs'¹ above-named, hereby appeal to the Supreme Court of the United States from the Order Modifying Injunction entered in this action on November 9, 1995.

This appeal is taken pursuant to Title 28, United States Code, Section 1253.

Dated: November 30, 1995.

JOAQUIN G. AVILA
BARBARA Y. PHILLIPS

By:

/s/

JOAQUIN G. AVILA
Attorney for Plaintiffs

¹ Jesse M. Sanchez passed away on August 2, 1995, and will not be listed as party in these appellate proceedings.

Seal of the United
States Department
of Justice

U.S. Department of Justice

Civil Rights Division

Voting Section

P.O. Box 66128

Washington, D.C. 20035-6128

November 13, 1995

Douglas C. Holland, Esquire
Monterey County Counsel
P. O. Box 1587
Salinas, California 93902-1587

Joaquin G. Avila, Esquire
Parktown Office Bldg.
1774 Clear Lake Avenue
Milpitas, California 95035-7014

Re: Lopez et al. v. County of Monterey, California, No.
C-91-20559-RMW (N.D. Cal.) (three-judge court)

Dear Messrs. Holland and Avila:

This letter is in response to recent inquiries we have received from each of you concerning the status under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, of a variety of voting changes related to the above-referenced case. This letter will address the scope of our March 6, 1995, preclearance letter and the Section 5 status of Cal. Stat. 1979 ch. 694 ("Chapter 694") and Cal. Stat. 1989 ch. 608 ("Chapter 608").

With regard to our March 6, 1995, preclearance of the interim election plan for the election of municipal court judges in Monterey

County (File Nos. 95-0023, 95-0507, 95-0619, and 95-0620), we understand that this Section 5 determination was discussed at the September 28, 1995 status conference in the above-referenced case. Contrary to representations that apparently were made at that status conference, the at-large method of election for the municipal court judges in Monterey County was never submitted for Section 5 review, and it has not been precleared.

On January 3, 1995, Monterey County submitted for Section 5 preclearance an interim election plan that provided for a 1995 special election at which Monterey County municipal court judges would be elected from electoral subdistricts (termed "divisions"). See Attachment A (December 29, 1994 Letter from Douglas C. Holland to Sarabeth Donovan). The county's submission letter requested that the Attorney General review Resolution No. 94-523 of the Monterey County Board of Supervisors, which formally adopted the interim election plan "consistent with the Second Stipulation presented to the United States District Court for the District of California in the Lopez case by Plaintiffs and the County on January 13, 1994." Id. Resolution 94-523 specified that the interim election plan would consist of "one [county-wide] Municipal Court District" with four judicial divisions "used solely for the purpose of electing municipal court judges." Id.¹

On March 6, 1995, the Attorney General precleared the interim election plan. This included not only a special election schedule, the "division" method of election, a districting plan for divisions, and terms of office, but also, for purposes of implementing the interim method of election, "the consolidation of the municipal and justice courts that existed on November 1, 1968, into a single

¹ The county amended its submission by letter dated January 10, 1995, making changes to the proposed special election procedures; however, the operative language cited in the text was unchanged. See Attachment B (January 10, 1995 Letter from Douglas C. Holland to Sarabeth Donovan).

municipal court" and a tenth judgeship. See Attachment C (March 6, 1995 Letter from Deval L. Patrick to Douglas C. Holland, Esq.); see also Attachment D (March 6, 1995 Fax Cover Page from Leroy W. Blakenship to Mr. Mark Posner - DOJ)(requesting the Attorney General review the tenth municipal court judgeship as part of the interim plan).

As indicated in its December 29, 1994 submission letter, the county's Section 5 submission was limited to those changes that were part and parcel of the interim election plan, "consistent with the [December 20, 1994] order of the court." See Attachment A.² While the county sought and obtained preclearance for the consolidation and the tenth judgeship as they pertain to the interim plan, it did not seek preclearance for a permanent consolidation or creation of a permanent tenth judgeship as effectuated by the post-November 1, 1968 ordinances at issue in the *Lopez* litigation. Moreover, the county did not in any way seek preclearance for the at-large method of election.³

² It is well established that the submission of legislation for Section 5 preclearance defines the scope of the preclearance request. *Clark v. Roemer*, 500 U.S. 646, 656 (1990) (citing *McCain v. Lybrand*, 465 U.S. 236 (1984)). Therefore, it is the responsibility of the jurisdiction to identify each change with specificity in the submission. Any ambiguity as to what is being submitted "must be resolved against the submitting authority." *Id.*

³ The manner in which the Attorney General's March 6, 1995, preclearance letter was formatted may well have allowed for some confusion as to what changes were precleared. The preclearance letter refers to the "interim election plan," "the consolidation of the municipal and justice courts," "the establishment of a tenth municipal court judgeship," the districting plan for divisions, the terms of office of persons elected as municipal court judges, and the procedures for conducting the special election and run-off, in separately numbered paragraphs. However, as explained above, all of these changes pertain

Under the Attorney General's Procedures for the Administration of Section 5, it was procedurally appropriate for the Attorney General to preclear the consolidation and tenth judgeship (i.e., a county-wide municipal court district) in the context of the interim election plan, as a necessary step for the implementation of that plan. See Procedures for the Administration of Section 5, 28 C.F.R. 51.22. However, the interim election plan ordered by the *Lopez* Court on December 20, 1994, implicitly recognized that such an interim consolidation of the municipal court was severable from the at-large election method contained in the county ordinances at issue in *Lopez*. That Court Order led the county to seek preclearance for the interim "division" election plan and the other changes necessary to implement that plan, and the Attorney General then precleared only those changes in light of the interim plan. Thus, it is clear from the submission letter that the at-large method of election was never submitted for Section 5 review, and the March 6, 1995, preclearance letter demonstrates that the Attorney General did not review or preclear the at-large method of election.

With regard to the inquiry concerning the Section 5 status of any voting changes occasioned by Chapter 694 (1979) and Chapter 608 (1989), we have investigated whether any such voting changes have been submitted for Section 5 review. We note that there is considerable uncertainty as to whether these two California state statutes actually effectuate voting changes or simply recognize and codify voting changes already effectuated by county ordinances at issue in the *Lopez* case.

Our records fail to show that any voting changes occasioned by Chapter 694 (1979) (recognizing the consolidation of Monterey County municipal court and some justice court districts) have been submitted for Section 5 review either to the United States District

to the 1995 interim election plan.

Court for the District of Columbia or to the Attorney General. Our records do show that any voting changes caused by Chapter 608 (1989) (recognizing the creation of a 10th municipal court judgeship in Monterey County, California) were submitted to the Attorney General for Section 5 review, along with other state statutes, on January 9, 1990. See Attachment E (January 2, 1990 Letter from Caren Daniels-Meade to Chief, Voting Section). On March 12, 1990, we informed the State of California that we would make no determination with regard to any voting changes caused by Chapter 608 (1989), and explained that a related change, contained in the Monterey County ordinance (No. 88-597), creating the tenth municipal court judgeship, had not been submitted to the District Court for the District of Columbia or to the Attorney General for Section 5 review. See Attachment F (March 12, 1990 Letter from James P. Turner to Ms. Caren Daniels-Meade). We explained in our letter that it was necessary that the voting changes in both the state statute and county ordinance be reviewed simultaneously. See 28 C.F.R. 51.22(b) and 51.35. On the same day, we sent a letter to Monterey County requesting that the voting changes occasioned by the referenced ordinance be submitted for preclearance. See Attachment G (March 12, 1990 Letter from James P. Turner to Ms. Nancy Lukenbill). As explained above, the permanent voting changes occasioned by Monterey County Ordinance No. 88-597 (and particularly the at-large method of election for the new judgeship) have never been submitted for Section 5 review, although they are at issue in Lopez.

As you know, changes in procedure which affect voting are legally unenforceable unless Section 5 preclearance has been obtained. See Procedures for the Administration of Section 5 (28 C.F.R. 51.2, 51.10, 51.12, 51.13, and 51.23). It appears that any voting changes occasioned by Chapter 694 (1979) and Chapter 608 (1989) are directly related to the voting changes occasioned by Monterey County ordinances at issue in Lopez. Therefore, prior to any further implementation, all these changes should be submitted for either

administrative or judicial Section 5 review simultaneously by the county.

To enable us to fulfill our responsibilities under Section 5, we request that Monterey County inform us of any action it plans to take concerning this matter. If you have any questions, you should call Cal G. Gonzales (202-514-6450), an attorney in the Voting Section.

Sincerely,

Deval L. Patrick
Assistant Attorney General
Civil Rights Division

By: _____/s/_____

Elizabeth Johnson
Acting Chief, Voting Section

cc: Counsel of Record

MONTEREY COUNTY Section 5 Sub. No. 950023 Monterey
OFFICE OF THE COUNTY COUNSEL

County
Seal

(408) 755-5045 - P.O. BOX 1587, COURTHOUSE, SALINAS,
CALIFORNIA 93902-1587
FAX NO. (408) 755-5283

DOUGLAS C. HOLLAND
COUNTY COUNSEL

December 29, 1994.

Sarabeth Donovan.
Deputy Attorney General
Voting Section
Civil Rights Division
Department of Justice
P.O. Box 66128
Washington, D.C. 20035-6128

Re: **Monterey County Municipal Court Plan of Organization**
Lopez et al. v. County of Monterey, Case No C-91-20559
RMW (EAI)

Dear Ms. Donovan:

As you are now aware, the Federal District Court for the Northern District of California on December 20, 1994 issued an interim order in the Lopez case. The Court ordered the County to develop a permanent plan for the election of municipal court judges consistent with the Voting Rights Act and state laws and enjoined the County from holding elections for municipal court judges pending adoption and preclearance of a permanent plan. The Court, however, specifically instructed the County to "implement as a court-ordered,

ATTACHMENT A

emergency, interim plan for a special election in 1995 the election plan set forth in the Second Stipulation" which the plaintiffs and the County had submitted to the Court on January 13, 1994.

The relief the Court granted was essentially the relief that Mr. Avila, you, and this Office requested at the status conference in November of 1994.

The Board of Supervisors, which was in session at the time the court order was received, reviewed the court order and adopted Resolution No. 94-523, adopting an emergency, interim municipal court division plan and calling for a special election to be conducted June 6, 1995. The Board's action was entirely consistent with the order of the court. A copy of the Board's resolution is attached for your reference and review.

On behalf of the County, we are requesting that your Office review this resolution pursuant to the provisions of Section 5 of the Voting Rights Act and preclear this action of the Board of Supervisors so that the Court's order can be fully implemented and the scheduled elections can proceed.

We must emphasize that we are not convinced that this matter actually needs to be precleared. We believe that the Board's resolution was essentially an administrative act ordered by and consistent with an order of the Court. The Board did not have any discretion to do anything but adopt the resolution as required by the Court. The Board action should not be viewed as an act of legislative discretion.

We should also emphasize that the Board, in its stipulation as presented to the Court in January of 1994, did not approve or adopt any specific plan. The stipulation simply outlined certain components that the County and the plaintiffs requested the Court to include in any subsequent order. We have taken the liberty of including a copy of the January stipulation for your review. The Board did not see any

specific plan consistent with the stipulation until the Board's March meeting in response to an earlier order to show cause issued by the Court. The specific plan was presented to the Board solely for informational purposes and as part of a total package of various plan alternatives to demonstrate the inability of the County to adopt a plan that would be consistent with the Voting Rights Act and all state laws. A copy of the Board's March action is also included for your review. The Board did not adopt any specific municipal court election plan until ordered to do so by the Court on December 20, 1994.

We should also point out that the basic plan as adopted by the Board was originally prepared by Mr. Avila on behalf of the plaintiffs. The boundaries of the Court Divisions 1 and 2 were entirely prepared at Mr. Avila's direction. It is also our understanding that the plaintiffs in this case are completely supportive of the election plan as adopted by the Board at the direction of the Court.

We are of course requesting that you provide expedited review of this submission. Your Office has had the opportunity to review a great deal of documents related to this case and the entire municipal court organization situation in Monterey County as a result of its participation in this case and the related District Court of Columbia case that Monterey County filed in 1993. Thus, we assume that you have everything that you require to review and consider this matter if your office determines that preclearance is warranted. If you need any further information or if we can provide you with any assistance of any kind, please do not hesitate to give us a call.

We especially want to thank you and your Office for your assistance in securing this favorable ruling from the Court. We don't believe that we would have enjoyed this success without your participation and involvement.

Have happy and prosperous New Year.

/s/
Douglas C. Holland
County Counsel

*Before the Board of Supervisors in and for the
County of Monterey, State of California*

Resolution No. 94 - 523 -)
 Resolution of the Monterey County Board)
 of Supervisors Adopting an Emergency,)
 Interim Municipal Court Division Plan, and)
 Calling a Special Election to be Conducted)
 June 6, 1995, Pursuant to Order of the)
 United States District Court.....)

The Board of Supervisors of Monterey County, California, finds:

1. On December 20, 1994, the United States District Court for the Northern District of California filed its "Order Enjoining Elections Pending Preclearance of Permanent Plan Except for Court-Ordered Special Election in 1995" in the case of Lopez v. Monterey County, California, Case No. C 91-20559 RMW (EAI), which provides that:

1.1. "Monterey County is ordered to develop a permanent plan for the election of municipal court judges which complies with the Voting Rights Act and does not violate state law. The County shall take any steps required to obtain changes in existing state law and county ordinances."

1.2. "Monterey County is hereby enjoined from holding elections for municipal court judges pending adoption and preclearance of a permanent plan or further order of this court."

1.3. "Notwithstanding paragraph [1.2] above, the County shall implement as a court-ordered, emergency, interim plan for a special election in 1995 the election plan set forth in the Second Stipulation presented to the court by

Plaintiffs and the County on January 13, 1994 with a new election calendar as set forth in the memorandum of the Registrar of Voters to the County Counsel dated October 4, 1994. The terms of office of those elected pursuant to the interim plan shall expire on the first Monday in January 1997. The court foresees that a permanent, precleared plan will be implemented in time for the next general election in 1996. The court retains jurisdiction over the implementation of the court-ordered, interim plan."

2. The Board of Supervisors hereby finds that it is compelled by the foregoing federal court order to adopt an emergency, interim plan for the special election of municipal court judges; that the emergency, interim plan must conform to the Municipal Court Division Plan set forth in the Second Stipulation presented to the court by Plaintiffs and the County on January 13, 1994; that a special election be called for June 6, 1995 for election of municipal court judges pursuant to the Municipal Court Division Plan; and that the special election be conducted pursuant to the expedited election calendar as set forth in the memorandum of the Registrar of Voters to the County Counsel dated October 4, 1994.

Now, therefore, be it resolved that:

1. The Board of Supervisors of Monterey County, California hereby adopts an emergency, interim Municipal Court Division Plan (the "Plan") for a special election in 1995, consistent with the Second Stipulation presented to the United States District Court for the Northern District of California in the Lopez case by Plaintiffs and the County on January 13, 1994, as follows:

1.1. There will be one Municipal Court District. This District will be county-wide. All municipal court judges, regardless of residency or division area, will serve the entire county and can be assigned to any judicial assignment or any

court location. Assignments will be made without regard to residency or division area. For the purpose of this Plan, the term "district" is and shall be the "district" referred to in Section 5 of Article VI of the Constitution of the State of California and Chapters 6 and 8 of Title 8 of the Government Code of the State of California.

1.2. The Plan shall consist of four divisions. A division will be a specific geographic area in which only the persons residing may vote. These judicial divisions shall be used solely for the purpose of electing municipal court judges. These divisions shall not be used for any other purpose, including, but not limited to, the assignment of cases or court locations. Three of the divisions will be one judge divisions. The fourth division shall consist of seven judges. For the purpose of election of judges, the term "division" as used in this Plan is and shall be the "district" referred to in subdivision (b) of Article VI of the Constitution of the State of California.

1.2.1. A summary table of the Plan setting forth the total population, voting age population, and estimated population of voting age citizens within each division is attached to this resolution and incorporated herein by reference.

1.2.2. The boundaries of the divisions shall be as set forth in the maps attached to this resolution and incorporated herein by reference. The County Counsel, after consultation with legal counsel for the Lopez Plaintiffs, may make minor adjustments to the boundary lines of any division in the event that such changes may be necessary or appropriate and do not conflict with the requirements of the Voting Rights Act.

1.2.3. Divisions 1, 2, and 3 as shown on the attached maps shall be one judge divisions. Division 4 as shown on the attached maps shall consist of seven judges. For purposes of this Plan, the Board of Supervisors hereby designates the following judges to the divisions specified:

Division 1:	Judge Burleigh's seat
Division 2:	Judge Fields' seat
Division 3:	Judge Simmons' seat
Division 4:	Judge Curtis' seat
	Judge Hedegard's seat
	Judge Kingsley's seat
	Judge Scott's seat

1.2.4. Municipal court judges elected at the special election shall take office upon certification of election results by the Registrar of Voters, or as soon thereafter as practicable, and shall hold office under the Plan until the first Monday in January, 1997 pursuant to federal court order.

1.3. The Plan shall comply with the requirements of the Voting Rights Act.

2. The Board of Supervisors hereby calls a special election in the County of Monterey for the election of municipal court judges pursuant to the Plan. The special election shall be conducted on June 6, 1995, and the schedule of election activities shall be as set forth in the memorandum of the Registrar of Voters to the County Counsel dated October 4, 1994, a copy of which is attached to this resolution and incorporated herein by reference.

2.1. The special election for municipal court judges shall be a single, "winner-take-all" election where the

candidate receiving the highest number of votes for each office shall be declared the winner, regardless of whether such candidate receives a simple majority or a plurality of votes case for the office.

2.2. The Registrar of Voters is hereby directed and authorized to perform such duties as may be required by law, necessary or useful, or customary and appropriate in the conduct of the special election, so long as not inconsistent with the schedule of election activities attached hereto.

2.3. The precincts, polling places for said precincts, and persons appointed and designated to serve as election officers for said special election will be those determined, designated, and appointed pursuant to state law by the Registrar of Voters.

2.4. This special election may be consolidated with such other elections as may be held on June 6, 1995, under state law with the County of Monterey.

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PASSED AND ADOPTED on this 20th day of December, 1994, upon motion of Supervisor Karas, seconded by Supervisor Salinas, by the following vote, to wit:

AYES: Supervisors Salinas, Shipnuck, Perkins, Johnsen and Karas.

NOES: None.

ABSENT: None.

I, ERNEST K. MORISHITA, Clerk of the Board of Supervisors of the County of Monterey, State of California, hereby certify that the foregoing is a true copy of an original order of said Board of Supervisors duly made and entered in the minutes thereof at page of Minute Book 68, on December 20, 1994.

Dated: December 20, 1994

ERNEST K. MORISHITA, Clerk of the Board of Supervisors, County of Monterey, State of California.

By /s/
[Nancy Lukenbill] Deputy

MONTEREY COUNTY
OFFICE OF THE COUNTY COUNSEL

(408) 755-5045 - P.O. BOX 1587, COURTHOUSE, SALINAS,
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DOUGLAS C. HOLLAND
COUNTY COUNSEL

Monterey
County
Seal

January 10, 1995

Sarabeth Donovan
Attorney
Voting Section
Civil Rights Division
Department of Justice.
P.O. Box 66128
Washington, D.C. 20035-6128

Re: **Monterey County Municipal Court Plan of Organization**
Lopez et al. v. County of Monterey, Case No C 91-20559
RMW (EAI)

Dear Ms. Donovan:

The Federal District Court for the Northern District of California on January 10, 1995 issued an order clarifying its order of December 20, 1994 in the Lopez case. In its December 20, 1994 order, the Court ordered the County to develop a permanent plan for the election of municipal court judges consistent with the Voting Rights Act and state laws and enjoined the County from holding elections for municipal court judges pending adoption and preclearance of a permanent plan.

ATTACHMENT B

In addition, the Court, specifically instructed the County to "implement as a court-ordered, emergency, interim plan for a special election in 1995 the election plan set forth in the Second Stipulation" which the plaintiffs and the County had submitted to the Court on January 13, 1994.

The relief the Court granted was essentially the relief that Mr. Avila, you, and this Office requested at the status conference in November of 1994.

On January 10, 1995, the Court also clarified its previous order by advising us that the County should conduct primary elections and, if a candidate is unable to achieve a majority vote in the primary election, provide for appropriate run-off elections.

The Board of Supervisors, as it did when it adopted its Resolution No. 94-523, was in session at the time the court clarification was received, reviewed the court order, and adopted Resolution No. 95-025, amending Resolution No. 94-523 in its entirety and adopted an emergency, interim municipal court division plan calling for a special primary election to be conducted on June 6, 1995. Resolution No. 95-025 also calls for a special, run-off election for August 1, 1995 for each municipal court seat where no candidate receives a majority vote at the primary election.

Resolution No. 95-025 also provides that judges elected to office at the special, primary election or at the special, run-off election may take office upon certification of the applicable election results by the Registrar of Voters.

The Board's action was entirely consistent with the order of the court. A copy of the Board's resolution is attached for your reference and review.

On behalf of the County, we are requesting that your Office review

this resolution pursuant to the provisions of Section 5 of the Voting Rights Act and preclear this action of the Board of Supervisors so that the Court's order can be fully implemented and the scheduled elections can proceed.

We must emphasize again that we are not convinced that this matter actually needs to be precleared. We believe that the Board's resolution was essentially an administrative act ordered by and consistent with the orders of the Court. The Board did not have any discretion to do anything but adopt the resolution as required by the Court. The Board action should not be viewed as an act of legislative discretion.

In the event that you do undertake to review this matter for preclearance, we would renew our request for expedited review of this submission. As we discussed in previous correspondence, your Office has had the opportunity to review a great deal of documents related to this case and the entire municipal court organization situation in Monterey County as a result of its participation in this case and the related District Court of Columbia case that Monterey County filed in 1993. Thus, we assume that you have everything that you require to review and consider this matter if your office determines that preclearance is warranted. If you need any further information or if we can provide you with any assistance of any kind, please do not hesitate to give us a call.

/s/

Douglas C. Holland
County Counsel

*Before the Board of Supervisors in and for the
County of Monterey, State of California*

Resolution No. 95 - 025 -)
Resolution of the Monterey County Board)
of Supervisors Amending Resolution)
No. 94-523 Providing for an Emergency)
Interim Municipal Court Division Plan,)
Calling a Special Primary Election)
to be Conducted June 6, 1995, and)
Providing for a Special Run-Off Election)
to be Conducted on August 1, 1995,)
Pursuant to Order of the)
United States District Court.....)

The Board of Supervisors of Monterey County, California, finds:

1. On December 20, 1994, the United States District Court for the Northern District of California filed its "Order Enjoining Elections Pending Preclearance of Permanent Plan Except for Court-Ordered Special Election in 1995" in the case of Lopez v. Monterey County, California, Case No. C 91-20559 RMW (EAI), which provides that:

1.1. "Monterey County is ordered to develop a permanent plan for the election of municipal court judges which complies with the Voting Rights Act and does not violate state law. The County shall take any steps required to obtain changes in existing state law and county ordinances."

1.2. "Monterey County is hereby enjoined from holding elections for municipal court judges pending adoption and preclearance of a permanent plan or further order of this court."

1.3. "Notwithstanding paragraph [1.2] above, the County shall implement as a court-ordered, emergency, interim plan for a special election in 1995 the election plan set forth in the Second Stipulation presented to the court by Plaintiffs and the County on January 13, 1994 with a new election calendar as set forth in the memorandum of the Registrar of Voters to the County Counsel dated October 4, 1994. The terms of office of those elected pursuant to the interim plan shall expire on the first Monday in January 1997. The court foresees that a permanent, precleared plan will be implemented in time for the next general election in 1996. The court retains jurisdiction over the implementation of the court-ordered, interim plan."

2. The Board of Supervisors hereby finds that it is compelled by the foregoing federal court order to adopt an emergency, interim plan for the special election of municipal court judges; that the emergency, interim plan must conform to the Municipal Court Division Plan set forth in the Second Stipulation presented to the court by Plaintiffs and the County on January 13, 1994; that a special election be called for June 6, 1995 for election of municipal court judges pursuant to the Municipal Court Division Plan; and that the special election be conducted pursuant to the expedited election calendar as set forth in the memorandum of the Registrar of Voters to the County Counsel dated October 4, 1994.

3. In addition, the Board of Supervisors finds that conducting the special election on June 6, 1995 as a primary election, with a special run-off election to be conducted on August 1, 1995, if such run-off election is necessary, is consistent with the Voting Rights Act of 1965, as amended, serves the interests of all candidates for municipal court offices, and promotes the right of all voters to elect candidates of their choice.

4. In view of the foregoing, Resolution No. 94-523 of the

Board of Supervisors of Monterey County, adopted December 20, 1994, must be amended to provide for a special run-off election, if such run-off election is necessary, and, except as amended herein, Resolution No. 94-523 continues in full force and effect.

Now, therefore, be it resolved that:

1. The Board of Supervisors of Monterey County, California hereby adopts an emergency, interim Municipal Court Division Plan (the "Plan") for a special election in 1995, consistent with the Second Stipulation presented to the United States District Court for the Northern District of California in the Lopez case by Plaintiffs and the County on January 13, 1994, as follows:

1.1. There will be one Municipal Court District. This District will be county-wide. All municipal court judges, regardless of residency or division area, will serve the entire county and can be assigned to any judicial assignment or any court location. Assignments will be made without regard to residency or division area. For the purpose of this Plan, the term "district" is and shall be the "district" referred to in Section 5 of Article VI of the Constitution of the State of California and Chapters 6 and 8 of Title 8 of the Government Code of the State of California.

1.2. The Plan shall consist of four divisions. A division will be a specific geographic area in which only the persons residing may vote. These judicial divisions shall be used solely for the purpose of electing municipal court judges. These divisions shall not be used for any other purpose, including, but not limited to, the assignment of cases or court locations. Three of the divisions will be one judge divisions. The fourth division shall consist of seven judges. For the purpose of election of judges, the term "division" as used in this Plan is and shall be the "district" referred to in subdivision

(b) of Article VI of the Constitution of the State of California.

1.2.1. A summary table of the Plan setting forth the total population, voting age population, and estimated population of voting age citizens within each division is attached to this resolution and incorporated herein by reference.

1.2.2. The boundaries of the divisions shall be as set forth in the maps attached to this resolution and incorporated herein by reference. The County Counsel, after consultation with legal counsel for the Lopez Plaintiffs, may make minor adjustments to the boundary lines of any division in the event that such changes may be necessary or appropriate and do not conflict with the requirements of the Voting Rights Act.

1.2.3. Divisions 1, 2, and 3 as shown on the attached maps shall be one judge divisions. Division 4 as shown on the attached maps shall consist of seven judges. For purposes of this Plan, the Board of Supervisors hereby designates the following judges to the divisions specified:

Division 1: Judge Burleigh's seat
 Division 2: Judge Fields' seat
 Division 3: Judge Simmons' seat
 Division 4: Judge Curtis' seat
 Judge Hedegard's seat
 Judge Kingsley's seat
 Judge Scott's seat

1.2.4. Municipal court judges elected at the special primary election on June 6, 1995, or at the

special run-off election on August 1, 1995, if such run-off election is necessary, shall take office upon certification of election results by the Registrar of Voters, or as soon thereafter as practicable, and shall hold office under the Plan until the first Monday in January, 1997 pursuant to federal court order.

1.3. The Plan shall comply with the requirements of the Voting Rights Act.

2. The Board of Supervisors hereby calls a special primary election in the County of Monterey for the election of municipal court judges pursuant to the Plan. The special primary election shall be conducted on June 6, 1995, and the schedule of election activities shall be as set forth in the memorandum of the Registrar of Voters to the County Counsel dated October 4, 1994, a copy of which is attached to this resolution and incorporated herein by reference.

2.1 In the event that no candidate for municipal court judicial office receives a majority of votes cast for that office at the special primary election, a special run-off election shall be conducted on August 1, 1995 between the two candidates receiving the highest number of votes for that office, and the winner shall be that candidate receiving the highest number of votes at the special run-off election.

2.2. The Registrar of Voters is hereby directed and authorized to perform such duties as may be required by law, necessary or useful, or customary and appropriate in the conduct of the special primary election and the special run-off election, if such run-off election is necessary, so long as not inconsistent with the schedule of election activities attached hereto.

2.3. The precincts, polling places for said precincts, and persons appointed and designated to serve as election officers for said special primary election and the special run-off election will be those determined, designated, and appointed pursuant to state law by the Registrar of Voters.

2.4. This special primary election may be consolidated with such other elections as may be held on June 6, 1995, under state law with the County of Monterey.

///
///

PASSED AND ADOPTED on this 10th day of January, 1995, upon motion of Supervisor Karas, seconded by Supervisor Johnsen, by the following vote, to wit:

AYES: Supervisors Salinas, Pennycook, Perkins, Johnsen, Karas.

NOES: None.

ABSENT: None.

I, ERNEST K. MORISHITA, Clerk of the Board of Supervisors of the County of Monterey, State of California, hereby certify that the foregoing is a true copy of an original order of said Board of Supervisors duly made and entered in the minutes thereof at page of Minute Book 68, on January 10, 1995.

Dated: January 10, 1995

ERNEST K. MORISHITA, Clerk of the Board of Supervisors, County of Monterey, State of California.

By /s/
[Pamela Olivas] Deputy

Seal of the United
States Department
of Justice

U.S. Department of Justice

Civil Rights Division

Voting Section

P.O. Box 66128

Washington, D.C. 20035-6128

DLP:MAP:SBD:tlb

DJ 166-012-3

95-0023; 95-0507

95-0619; 95-0620

March 6, 1995

Douglas C. Holland, Esq.
Monterey County Counsel
P. O. Box 1587
Salinas, California 93902-1587

Dear Mr. Holland:

This refers to the submissions to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, of the following voting changes for the municipal court of Monterey County, California:

1. the consolidation of the municipal and justice courts that existed on November 1, 1968, into a single municipal court with nine judgeships;
2. the establishment of a tenth municipal court judgeship;
3. the adoption of an interim election plan for a 1995

ATTACHMENT C

special election pursuant to which municipal court judges shall be elected from four election subdistricts (known as divisions) with Divisions 1, 2, and 3 each electing one judge and Division 4 electing seven judges;

4. the districting plan for the divisions (as adopted on December 20, 1994, and modified in the manner reflected in the February 21, 1995, correspondence from the county's demographer, Dr. Jeannne Gobalet);

5. the term of office of persons elected as municipal court judges pursuant to the interim election plan; and

6. the procedures for conducting a June 6, 1995, special primary and an August 1, 1995, special runoff election to elect one judge each in Divisions 1, 2, and 3, and four judges in Division 4 (superseding the procedures for conducting a single, "winner-take-all" election on June 6, 1995).

We received your submission of the municipal court consolidation, the interim election plan, the districting plan (as adopted on December 20, 1994), the term of office, and the procedures for conducting a June 6, 1995, single election on January 3, 1995; your submission of the procedures for conducting a June 6, 1995, special primary and an August 1, 1995, special runoff election on January 11, 1995; your submission of the revisions to the districting plan on February 23, 1995; and your submission of the additional judgeship on March 6, 1995. Supplemental information was received on January 6 and February 26, 1995.

The Attorney General does not interpose any objection to the municipal court consolidation, the interim election plan, the districting plan (as modified), the term of office, the procedures for conducting a June 6 special primary and an August 1 special runoff, and the additional judgeship. However, we note that Section 5 expressly

provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the changes. In addition, as authorized by Section 5, we reserve the right to reexamine these changes if additional information that would otherwise require an objection comes to our attention during the remainder of the sixty-day review period. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.41 and 51.43).

With regard to the procedures for conducting a single June 6 special election, this change has been superseded and, accordingly, the Attorney General will make no determination with respect to this change.

Sincerely,

Deval L. Patrick
Assistant Attorney General
Civil Rights Division

By: /s/

Elizabeth Johnson
Acting Chief, Voting Section

cc: Joaquin G. Avila, Esq.

App. 56

Monterey
County
California
Seal
1850

FAX COVER

PAGE

To: Mr. Mark Posner-DOJ From: Leroy W.
Blankenship

Fax Number: 1-202- Company: Monterey
307-2569 County Counsel

Date: Time: For Information Call:
3/6/95 15:02:08 1-408-755-5045

Subject: Additional Fax Number: 1-408-
Information 771-0595

Pursuant to your request and that of Ms. Donovan this afternoon, Monterey County, California hereby requests that you review the addition of the 10th municipal court judge as part of the County's preclearance submission concerning the interim plan for election of municipal court judges, as provided by the US District Court's order of December 20, 1994 in Lopez v. Monterey County, California, USDC N.Cal. No. C-91-20559-RMW (EAI).

As noted by the Court's order at 3:7, "Monterey County had two municipal and seven justice court districts" before 1968. Based on information provided to us on short notice, we believe that these nine districts had eleven judges (as of the coverage date of November 11, 1968) as follows:

Salinas Municipal Court:

2

ATTACHMENT D

App. 57

Monterey Municipal Court:	2
San Ardo Justice Court:	1
King City Justice Court:	1
Greenfield Justice Court:	1
Soledad Justice Court:	1
Gonzales Justice Court:	1
Castroville-Pajaro Justice Court:	1
Pacific Grove Justice Court:	1

We will attempt to verify this information as quickly as we can and contact you with the results.

Our understanding is that the number of justice court judges was reduced as retirements occurred and as court consolidations progressed; there was, however, no reduction in the number of municipal court judges assigned to the bench(s) in Monterey County. By 1983 when the municipal court consolidation was completed, there were nine municipal court judges. The 10th municipal court judge was added as the result of the State Trial Court Funding Legislation (stats. 1987, ch. 1211 (SB 709)) and Monterey County Board of Supervisors Resolution No. 89-597, a copy of which resolution will be faxed separately. The 10th municipal court judge, Wendy Duffy, was appointed by the Governor and assumed office on November 2, 1989.

Cover pages by Delrina

*Before the Board of Supervisors in and for the
County of Monterey, State of California*

Resolution No. 88-597	)	[Handwritten
Resolution of the Board of	)	note: Mark
Supervisors of the County of	)	Posner
Monterey, Authorizing a Tenth	)	Dept. of
Judge for the Municipal Court	)	Justice
for the Purpose of Calculating	)	1-202-307-
Trial Court Funding Block	)	2569]
Grant Under Government Code)	
Section 77202.....)	

WHEREAS, the passage of Senate Bill 612, Chapter 945, Statutes of 1988, repealed and added Chapter 13 to Title 8 of the Government code (Section 77000 et seq.), known as the Brown-Presley Trial Court Funding Act of 1988; and

WHEREAS, the passage of Assembly Bill 1197, Chapter 944, Statutes of 1988, appropriated from the State General Fund the sums necessary to provide quarterly block grants to option counties based upon sums specified pursuant to Government Code Section 77200; and

WHEREAS, the provisions of Senate Bill 709, Chapter 1211, Statutes of 1987, authorize nine Municipal Court Judges for the County of Monterey and at such time as the Board of Supervisors finds there are sufficient funds for an additional judge and adopts a Resolution to that effect, authorize ten judges.

NOW, THEREFORE, BE IT RESOLVED that the Monterey County Board of Supervisors finds there is sufficient funding for one Municipal Court judgeship in addition to the nine judges previously authorized provided the State reimburses the County for each Judgeship based upon a rate of \$ 53,000 per Judgeship per quarter, to

be adjusted annually as set forth in Chapter 945 of the statutes of 1988.

BE IT FURTHER RESOLVED, in addition to any other rights in the matter the County might have, that if the rate of reimbursement falls below that set forth above, upon a vacancy on the Municipal Court bench, the Board of Supervisors may, by resolution, determine that sufficient funds are not available for the tenth judge and may withdraw the Board's authorization for the tenth judgeship.

PASSED AND ADOPTED on the 13th day of December, 1988, upon motion of Supervisor Petrovic, seconded by Supervisor Shipnuck, and carried by the following vote, to-wit:

AYES: Supervisors Del Piero, Shipnuck, Petrovic, and Karas.

NOES: None.

ABSENT: Supervisor Strasser Kauffman.

/

/

I, ERNEST K. MORISHITA, Clerk of the Board of Supervisors of the County of Monterey, State of California, hereby certify that the foregoing is a true copy of an original order of said Board of Supervisors duly made and entered in the minutes thereof at page = of Minute Book 61, on December 13, 1988

Dated: December 13, 1988

ERNEST K. MORISHITA, Clerk
of the Board of Supervisors,
County of Monterey, State of
California.

By /s/ Deputy
[Nancy Lukenbill]

ADMINISTRATIVE OFFICER'S COMMENTS

	BOARD	AGENDA
SUBJECT:	RESOLUTION UPDATING MEETING NUMBER	
	THE OFFICIAL COUNT	DATE S-9
	OF MONTEREY COUNTY	12-13-88
	MUNICIPAL COURT	
	JUDICIAL POSITIONS	
	AND INDICATING	
	AVAILABILITY OF	
	FUNDING	

RECOMMENDATION

That the Board approve the attached Resolution and authorize the Chair to sign on behalf of the County of Monterey.

DISCUSSION

Judicial Council of California requests that counties indicate by Resolution the correct count of judicial positions as a result of recently enacted legislation.

Senate Bill 709, Chapter 1211, Statutes of 1987, authorized Monterey County one additional Municipal Court judgeship contingent upon funding being appropriated in the State Budget. That having occurred, and in order to receive block grant funding for 10 rather than 9 judgeships for the period of January through March, 1989, this Resolution is required. This does not signify our intent to participate in the Brown-Presley Trial Court Funding Act of 1988; it merely allows for the block grant to be calculated to include the payment for the tenth judge should the Board and the Presiding Judges agree that participation is in the best interest of the County of Monterey. Only when that judge is on the bench will he/she receive the salary.

/s/

JOSEPH HART
Principal Administrative
Analyst

JH:km55c

REPORT TO THE MONTEREY COUNTY BOARD OF SUPERVISORS

Subject	Authorize Tenth Judge for Municipal Court	Board Meeting Date	Agenda Number S-9
		12/13/88	

Department Municipal Court

RECOMMENDATION:

It is recommended that the Board of Supervisors adopt a resolution authorizing a tenth Judge for the municipal court.

SUMMARY:

The Judicial Council has recommended an increase in judicial positions for the Municipal Court and legislation supported by the Board has been passed authorizing an additional position provided that the Board find funds are available and the county participates in trial court funding. It is anticipated that trial court block grant funds will become available from the State on January 1, 1989.

DISCUSSION:

The Municipal Court requested a Judicial needs study from the Judicial Council in 1986. The results of that study indicated a need for 12 judicial positions for the Municipal Court in 1987. Judicial Council weighted caseload findings are at an average of 11 judicial positions for the first half of Fiscal year 88-89 and at 12.24 judicial positions for the months of July-October 1988. There are ten judicial positions at this time, nine judges and one commissioner. The Court has worked hard in recent years to improve efficiency of its calendar and is proud of its success. The individual calendar system instituted

by the Court has been used as a model for other Municipal Courts in the State. The additional position is needed to maintain an efficient calendar and provide the proper level of service to the public.

Senate Bill 709 Chapter 1211 of the statutes of 1987 (Trial Court Funding Bill) amends Section 73562 of the government code to add a tenth Judge to the Court upon a finding by the Board of Supervisors that there are sufficient funds and the adoption of a resolution to that effect.

FINANCING:

Senate Bill 612, Chapter 945 of the statutes of 1988 changed the trial court funding to provide for a net block grant of \$ 53,000 per quarter per Judicial position to counties that exercise the option to become funded by the State, plus a supplemental grant of a Municipal Court Judge's salary less \$ 9,500 annually. For purposes of calculating the block grant a judgeship shall be deemed to be "authorized by statute" beginning with the fiscal year next following a resolution by the Board of Supervisors. It is expected that a bill will be introduced as urgency legislation amending that section to read "beginning with the quarter next following a resolution by the Board of Supervisors. Should the County "opt in" to State funding the block grant will provide funds for a tenth Judicial position. If the position is authorized during the month of December, the additional funding would begin in the first quarter of 1989 regardless of whether the position is filled provided that the section is amended by new legislation.

The cost of additional clerical support needed in Municipal Court for the additional Judge is estimated to be \$ 79,000, services and supplies, \$ 35,000.

An additional courtroom will be required. The assignment and location of the new Judge has not been determined and will depend upon workload and courtroom availability.

OTHER AGENCY INVOLVEMENT:

The creation of an additional Judicial position will have an impact on other criminal justice agencies, i.e., District Attorney, Public Defender, Sheriff, Probation. The annual costs to those agencies associated with an additional Judge are estimated by those agencies to be:

Sheriff	\$ 40,000
D.A.	\$ 88,500
Pub. Def.	\$ 88,500
Probation	\$ 67,300
	<hr/>
	\$ 284,300

What the costs actually will be depends upon the assignment of the Judge, i.e., if the assignment is strictly civil, the costs to other agencies will be minimized.

_____/s/
Katharine Tisdale
Municipal Court Administrator

KT/ss

ELECTIONS
DIVISION
(916)445-
0820

California Office of 1230 J Street
State Secretary
Seal of State
 State Sacramento,
 California
 95814

For Hearing
and Speech
Impaired
Only:
(800) 833-
8683

March
Fong Eu

January 2, 1990

Chief, Voting Section
Civil Rights Division
Department of Justice
Washington, D.C. 20530

[Stamp] Civil Rights
Division
Voting
Section
90 JAN - 9
AM 11:13

RE: Submission Under Section 5, Voting Rights
Act of 1965, As Amended, 42 W.S.C. 1973c.
28 C.F.R. § 51.22

To Whom It May Concern:

Pursuant to Section 5 of the Voting Rights Act of 1965, As Amended, the Secretary of State of California, as chief elections officer, is submitting 25 California state elections statutes relating to voting qualifications and voting procedures. The statutes, copies of

ATTACHMENT E

App. 66

which are enclosed, are identified by the attached list.

The date of final adoption of the elections statutes appears on the face of each statute, and an explanation of the difference between the submitted change and the existing law is found on the face of each statute in the Legislative Counsel's Digest.

I have attached the Roster California Legislature 1989-90. Those legislators who are authors of bills included here may be contacted directly during the review period if further information is desired for their particular bill regarding the origin, language, and intended effect of the bill.

The non-urgency legislation is effective January 1, 1990, while the urgency legislation has gone into effect to the extent necessary in preparation for the 1990 elections. Unless otherwise indicated on the attached list as urgency with an effective date, the legislation is effective January 1, 1990.

Please let us know of any additional information you may require.

Sincerely,

/s/

CAREN DANIELS-MEADE
Chief, Elections Division

CDM/rsn/pI

Enclosures

cc: (List only)

Joan L. Bullock
Kings County Clerk-Recorder

App. 67

Government Center
1400 West Lacey Blvd.
Hanford, California 93230

Kenneth L. Randol
Merced County Clerk
2222 "M" Street, Room 14
Merced, California 95340

Brad Clark
Monterey County Registrar of Voters
201 Main Street
P.O. Box 1848
Salinas, California 93902

Frances J. Fairey
Yuba County Clerk and Recorder
Courthouse
215 Fifth Street
Marysville, California 95901

89vralet

SUBMISSION UNDER SECTION 5 OF THE
VOTING RIGHTS ACT OF 1965 AS AMENDED

App. 68

SUBMITTED BY:

CAREN DANIELS-MEADE
CHIEF, ELECTIONS DIVISIONS
1230 "J" STREET, ROOM 232
SACRAMENTO, CA 95814-2974

JANUARY 2, 1990

January 2, 1990

1989 CALIFORNIA STATE LEGISLATION RELATING TO THE FEDERAL VOTING RIGHTS ACT

Chapter #	Bill #	Subject	Author	Affected Code	Action	Sections Affected
61	AB 660	District elections	Killea	Elections	Amend	23533
				Water	Amend	35106, 35107, 71505
					Add	35100
					Repeal	71460, 71470, 71471, 71472, 71510, 71511, 71513 & 71514
67	AB 1247	Municipal elec- tions, nomination	Mount- joy	Elections	Amend	22840.5

App. 69

<u>Chapter #</u>	<u>Bill #</u>	<u>Subject</u>	<u>Author</u>	<u>Affected Code</u>	<u>Action</u>	<u>Sections Affected</u>
204	AB 571	Recalled officers papers and incumbents	Chacon	Elections	Amend	27333 & 27341
233	SB 393	Cities	Russell	Government	Amend	56760, 56829, 56830, 56831, 57002 & 57068
						App. 70
238	AB 1415	Judicial office and incumbents	Mount-joy	Elections	Amend	25301 & 25305
303	SB 1497	Campaign contributions	Doolittle	Government	Amend	85202

<u>Chapter #</u>	<u>Bill #</u>	<u>Subject</u>	<u>Author</u>	<u>Affected Code</u>	<u>Action</u>	<u>Sections Affected</u>
310	SB 58	Ballots and polling places	Marks	Elections	Amend	29480 & 29630
					Add	29506, 29634, 29635 & 29636
					Repeal	14248
323	SB 362	Local Agency For- mation Commissions	Berge-son	Government	Amend	57025
					Repeal	56161, 56654, 56655, Article 8 (commencing with § 50190) of Chapter 1 of Division 1 of Title 5
						App. 71

<u>Chapter #</u>	<u>Bill #</u>	<u>Subject</u>	<u>Author</u>	<u>Affected Code</u>	<u>Action</u>	<u>Sections Affected</u>
347	AB 620	Affidavits, initiative and referendum, death of a candidate, vote tabulating devices, precinct supplies, and vote count programs	Chacon	Elections	Amend	703, 4007, 4052, 6490.3, 10326, 17022, 17182 & 27023 App. 72
403	AB 941	Financial disclosure statements	Lempert	Government	Amend	87200

<u>Chapter #</u>	<u>Bill #</u>	<u>Subject</u>	<u>Author</u>	<u>Affected Code</u>	<u>Action</u>	<u>Sections Affected</u>
414	AB 233	Yuba County Water Agency	Chandler	Uncodified	Amend	Section 7 of Yuba County Water Agency Act (Chapter 788 of the Statutes of 1959) App. 73
415	AB 377	Intimidation of the voter	Polanco	Elections	Amend	29632
					Add	29630.5
608	SB 1423	Monterey and Santa Cruz Counties Municipal Courts	Mello	Government	Amend	73560, 73562, 73565, 73566, 73567, 73568, 74691, 74693 & 74693.1

<u>Chapter #</u>	<u>Bill #</u>	<u>Subject</u>	<u>Author</u>	<u>Affected Code</u>	<u>Action</u>	<u>Sections Affected</u>
617	SB 2493	Water districts, initiative measures	Campbell	Elections	Amend	5156.5
					Add	5156.6
623	SB 979	Legislators' salary	Beverly	Government	Amend	8901
638	AB 633	Nomination and registration documents	Mountjoy	Elections	Amend	503, 503.5, 6833, 6838 & 6920
						App. 74
680	SB 16	Voter Information and confidentiality	Lockyer	Elections	Add	615
				Government	Add	6254.4
710	SB 584	Local government and reorganization	Bergeson	Government	Amend	56476, 56486 & 57103

<u>Chapter #</u>	<u>Bill #</u>	<u>Subject</u>	<u>Author</u>	<u>Affected Code</u>	<u>Action</u>	<u>Sections Affected</u>
720	SB 981	Circulators' affidavit and initiative and referendum petitions	Dills	Elections	Add	57087.7
					Amend	44, 3519, 3520, 3706, 4004, 4005, 4008, 6494 & 22841
						App. 75
764	SB 491	Mass mailing, contributions to public agency officers	Marks	Government	Amend	84305 & 84308
789	SB 486	Special Districts	Bergeson	Government	Amend	56375, 61601 & 61601.7

<u>Chapter #</u>	<u>Bill #</u>	<u>Subject</u>	<u>Author</u>	<u>Affected Code</u>	<u>Action</u>	<u>Sections Affected</u>
					Add	61017, 61222 & 61621.8
					Repeal	61601.12, 61601.13, 61601.16, 61601.17, 61601.18 & 61601.20
						App. 76
					Repeal & add	61601.10, Part 2 (commencing with § 61100) of Division 3 of Title 6
				Health & Safety	Amend	4816

<u>Chapter #</u>	<u>Bill #</u>	<u>Subject</u>	<u>Author</u>	<u>Affected Code</u>	<u>Action</u>	<u>Sections Affected</u>
					Add	4730.7
				Public Resources	Add	5506.7, 5538.7 & 5539.7
				Water	Amend	36578
				Uncodi- fied	Amend	Section 96 of Chapter 22 of Statutes of 1960, First Ex- traordinary Session
983	SB 592	Domicile, affida- vit of registra- tion, precinct	Marks	Elections	Amend	216, 305, 1513, 3564.1, 3702, 3754, 3785.1,

<u>Chapter #</u>	<u>Bill #</u>	<u>Subject</u>	<u>Author</u>	<u>Affected Code</u>	<u>Action</u>	<u>Sections Affected</u>
1148	SB 680	boundaries, ballot arguments, and initiatives		Elections	Amend	4055, 501A.1, 5157.6, 5326 & 29202
		Voter registration	Marks			800
1417	SB 710	Justice courts	Stirling	Code of Civil Procedure	Add	805
					Amend	167, 170.8, 396b & 399
				Government	Amend	App. 78
						13967.5, 68080, 68202.5, 71702, 71600, 71661, 71661.1, 71662, 71664.5, 72056.1, 75002,

<u>Chapter #</u>	<u>Bill #</u>	<u>Subject</u>	<u>Author</u>	<u>Affected Code</u>	<u>Action</u>	<u>Sections Affected</u>
					Add	75003, 75004, 75026, 75033.5, 75101 & 75103
						75029.1, 75029.2 & 75076.2
					Repeal	App. 79
						71611, 71612, 71613, 71660, 71664 & 71700
				Penal	Amend	980 & 1164
				Vehicle	Amend	1803 & 1803.5

Chapter #	Bill #	Subject	Author	Affected Code	Action	Sections Affected
1452	SB 1431	Contribution expenditures	Roberti	Elections	Repeal & add	Chapter 5 (commencing with § 12400) of Division 9
				Government	Amend	84211 & 91005
					Add	Article 8 (commencing with § 85800) to Chapter 5 of Title 9

App. 80

App. 81

JPT:GS:DOW:rac
DJ 166-012-3
Z8966

March 12, 1990

Ms. Caren Daniels-Meade
Chief, Elections Division
1230 J Street
Sacramento, California 95814

Dear Ms. Daniels-Meade:

This refers to Chapter 608, S.B. No. 1423 (1989), which recognizes the creation of a 10th municipal court judge in Monterey County, California, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your submission on January 9, 1990.

We understand that Monterey County created this judgeship by Resolution. Our records fail to show that this change has been submitted to the United States District Court for the District of Columbia for judicial review or to the Attorney General for administrative review as required by Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973 c. If our information is correct, it is necessary that this change either be brought before the District Court for the District of Columbia or submitted to the Attorney General for a determination that the change does not have the purpose and will not have the effect of discriminating on account of race, color, or membership in a language minority group. Changes in procedure which affect voting are unenforceable unless and until the Section 5 preclearance requirements have been met. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.10).

ATTACHMENT F

App. 82

Since the change affected by Chapter 608 is related to the creation of this judgeship, it is necessary that these changes be reviewed simultaneously under Section 5. Accordingly, the Attorney General will make no determination with regard to your submission until such time as the creation of this judgeship undergoes Section 5 review. See also 28 C.F.R. 51.22(b).

By separate letter of this date we have informed Monterey County of the need to obtain Section 5 preclearance of the creation of this judgeship.

Sincerely,

James P. Turner
Acting Assistance Attorney General
Civil Rights Division

By: /s/

Barry H. Weinberg
Acting Chief, Voting Section

cc: Ms. Nancy Lukenbill

cc: Public File

App. 83

JPT:GS:DOW:rac
DJ 166-012-3
Z8751

March 12, 1990

Ms. Nancy Lukenbill
Clerk to the Board
240 Church Street
Salinas, California 93901

Dear Ms. Lukenbill:

It has come to our attention that Monterey County, California, has adopted a resolution creating a 10th municipal judgeship.

Our records fail to show that this change has been submitted to the United States District Court for the District of Columbia for judicial review or to the Attorney General for administrative review as required by Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973 c. If our information is correct, it is necessary that this change either be brought before the District Court for the District of Columbia or submitted to the Attorney General for a determination that the change does not have the purpose and will not have the effect of discriminating on account of race, color, or membership in a language minority group. Changes in procedure which affect voting are unenforceable unless and until the Section 5 preclearance requirements have been met. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.10).

Should you elect to make a submission to the Attorney General for administrative review rather than seek a declaratory judgment from the District Court for the District of Columbia, please

ATTACHMENT G

follow the procedures set forth in Subparts B and C of the guidelines.

To enable this Department to meet its responsibility to enforce the Voting Rights Act, please inform us of the course of action Monterey County plans to take with respect to this matter.

If you have any questions, feel free to call David Wiese (202-272-6288) of our staff. Refer to File No. Z8751 in any response to this letter so that your correspondence will be channeled properly.

Sincerely,

James P. Turner
Acting Assistance Attorney General
Civil Rights Division

By: /s/

Barry H. Weinberg
Acting Chief, Voting Section

cc: Ms. Caren Daniels-Meade

cc: Public File

42 U.S.C. § 1973 c.

Alteration of voting qualifications and procedures; action by State or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973 b (a) of this title based upon determinations made under the first sentence of section 1973 b (b) of this title are in effect shall enact or to seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973 b (a) of this title based upon determinations made under the second sentence of section 1973 b (b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973 b (a) of this title based upon determinations made under the third sentence of section 1973 b (b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973 b (f) (2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure

may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

Pub.L. 89-110, Title I, § 5, Aug. 6, 1965, 79 Stat. 439, redesignated and amended Pub.L. 91-285, §§ 2, 5, June 22, 1970, 84 Stat. 314, 315; Pub.L. 94-73, Title II, §§ 204, 206, Title IV, § 405, Aug. 6, 1975, 89 Stat. 402, 404.

28 C.F.R. § 51.54 Discriminatory effect.

(b) *Benchmark.* (1) In determining whether a submitted change is retrogressive the Attorney General will normally compare the submitted change to the voting practice or procedure in effect at the time of the submission. If the existing practice or procedure upon submission was not in effect on the jurisdiction's applicable date for coverage (specified in the Appendix) and is not otherwise legally enforceable under section 5, it cannot serve as a benchmark, and, except as provided in paragraph (b) (4) of this section, the comparison shall be with the last legally enforceable practice or procedure used by the jurisdiction.

**Monterey County Municipal Court Districts
Summary Table
Plan 7 B**

	1	2	3 Including All	Excluding Prison
Total Pop.	35,691	34,547	31,630	25,634
Latino	75%	74%	55%	59%
White (NH)	17%	17%	35%	37%
API	5%	7%	1%	2%
Black	2%	2%	8%	1%
IEA (NH)	1%	0%	1%	1%
Other (NH)	0%	0%	1%	0%
Pop. 18+	22,220	21,797	22,838	16,842
Latino	69%	69%	49%	54%
White (NH)	22%	21%	37%	42%
API	6%	7%	1%	2%
Black	2%	2%	11%	2%
IEA (NH)	1%	1%	1%	1%

	1	2	3 Including All	Excluding Prison
Pop. 18+ Cont'd				
Other (NH)	0%	0%	1%	0%
Citizens 18+(Est.)	12,950	12,649	16,049	11,313
Latino	52%	52%	30%	33%
White (NH)	37%	35%	52%	61%
API	7%	8%	1%	2%
Black	3%	3%	14%	2%
IEA (NH)	1%	1%	1%	1%
Other (NH)	0%	0%	1%	0%

NOTE: Latino percentages exclude Hispanic Blacks and Hispanic APIs. A district's Hispanic percentage may be one percentage point higher than a district's Latino percentage.

NH = Non-Hispanic

IEA = American Indian, Eskimo, or Aleut

API = Asian or Pacific Islander

Columns may not appear to total 100 percent because of rounding.

App. 90

	4	Total
Total Pop.	253,792	355,600
Latino	18%	33%
White (NH)	64%	52%
API	9%	8%
Black	8%	6%
IEA (NH)	1%	1%
Other (NH)	0%	0%
Pop. 18+	190,854	257,709
Latino	16%	28%
White (NH)	68%	57%
API	9%	8%
Black	7%	6%
IEA (NH)	1%	1%

App. 91

	4	Total
Pop. 18+ Cont'd		
Other (NH)	0%	0%
Citizens 18+(Est.)	170,088	211,735
Latino	11%	17%
White (NH)	74%	68%
API	7%	7%
Black	8%	8%
IEA (NH)	1%	1%
Other (NH)	0%	0%

Largest District	36,256
Smallest District	31,630
Difference	4,626
Ideal District	35,566
Deviation	13.0%

Lapkoff Gobalet Demographic Research, Inc.

Douglas C. Holland (#069014)
County Counsel
County of Monterey
Courthouse
240 Church Street, Room 214
Salinas, California 93902

Telephone: (408) 755-5045

Attorneys for Defendant

MONTEREY COUNTY, CALIFORNIA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

VICKY M. LOPEZ,	)	No. C-91-20559 RMW (EAI)
CRESCENCIO PADILLA,	)	(Voting Rights Action/
WILLIAM A. MELENDEZ	)	Three Judge Court)
JESSE G. SANCHEZ, and)	
DAVID SERENA,)	
Plaintiffs,	)	STIPULATIONS OF
	)	PLAINTIFFS AND
vs.	)	MONTEREY COUNTY
	)	FOR HEARING TO
MONTEREY COUNTY,	)	SHOW CAUSE
CALIFORNIA,)	
	)	Date: March 31, 1994
Defendant	)	Time: 1:30 p.m.
	)	Judges: Circuit Judge
	)	Mary M. Schroeder
STATE OF CALIFORNIA,	)	District Judges
	)	James Ware and
Defendant-	)	Ronald M. Whyte
Intervenor.)	

Filed March 16, 1994
Richard W. Wieking
Clerk, U.S. District
Court, Northern
District of California
San Jose

MICHAEL FIELDS,)
)
Defendant-)
Intervenor.)

On February 28, 1994, the three Judge Federal District Court in the case of Lopez et al. v. Monterey County ordered Monterey County to submit a new election plan for electing judges to the Monterey County Municipal Court District to the United States Attorney General or to the United States District Court for the District of Columbia for approval pursuant to Section 5 of the Voting Rights Act. [42 U.S.C. §§ 1973 c] The Court further ordered Monterey County to submit an election plan which fully complied with the Voting Rights Act and all applicable provisions of the California Constitution and State law. The Court also noted that if Monterey County was not able to submit such an election plan for Section 5 approval, then Monterey County would be required to show cause at a hearing scheduled for March 31, 1994, as to why such an election plan cannot be submitted. The factual basis for the inability of Monterey County to submit such an election plan should be "supported by affidavit, stipulation of the parties, or other admissible evidence."

Monterey County contends that an election plan cannot be adopted which fully complies with Section 5 of the Voting Rights Act and all applicable state constitutional and statutory provisions. Pursuant to the Court's Order, Monterey County and the Plaintiffs are submitting the following stipulations of fact. Monterey County will move to admit these stipulations of fact into evidence at the show cause hearing:

1. On March 26, 1968, the Board of Supervisors adopted Ordinance No. 1597. This ordinance amended Ordinance No. 1347, establishing municipal and justice court districts in Monterey County. Ordinance No. 1597 became effective on April 26, 1968. This is the Municipal Court/Justice Court Plan that was in effect on November

1, 1968, the effective date of Monterey County's status as a covered jurisdiction under Section 5 of the Voting Rights Act. This plan is therefore the baseline map for reviewing any plan that the Board of Supervisors may adopt consistent with the past direction of this Court. A copy of this map and a summary table is attached as Exhibit "A" to this stipulation.

2. An election schedule for conducting judicial elections in November, 1994 can be implemented. Attached to this Stipulation as Exhibit "B" is an amended election schedule which will permit the November, 1994 election process to proceed.

3. According to the 1990 Census, the Hispanic Origin population constituted 34% of the total population for Monterey County. Pl. Exh. No. 15, at p. 3, Alonzo Gonzalez, et al. v. Monterey County, Civil Action No. C-91-20736 WAI, admitted into evidence, Transcript Vol. XI, at p. 1605, November 17, 1992.

4. During the time period between 1980 through 1990 for Monterey County, the Hispanic Origin population growth rate was 59.1%, while the White Non-Hispanic population growth rate was 7.3%. Pl. Exh. No. 1, Alonzo Gonzalez, et al. v. Monterey County, Civil Action No. C-91-20736 WAI, admitted into evidence, Transcript Vol. XI, at p. 1603, November 17, 1992.

5. The 1980 and 1990 Censuses reported the following Spanish Origin and Hispanic Origin population concentrations for these selected areas in Monterey County:

Area	1980 Census Spanish Origin	1990 Census Hispanic Origin
Castroville Unincorporated	73.7%	79.4%
Salinas City	38.1%	50.6%
Gonzales City	68.1%	82.1%

Area	1980 Census Spanish Origin	1990 Census Hispanic Origin
Soledad City	82.8%	89.5%
Greenfield City	66.5%	77.2%

King City 48.6% 66.7%
Pl. Exh. No. 14, Alonzo Gonzalez, et al. v. Monterey County, Civil Action No. C-91-20736 WAI, admitted into evidence, Transcript Vol. XI, at p. 1605, November 17, 1992.

6. Based upon the 1990 Census, the Hispanic Origin population is geographically concentrated in East Salinas, the Castroville-Pajaro Valley north county area, and the south county area including the Cities of Gonzales, Soledad, Greenfield, and King City.

7. Based upon the 1990 Census, a ten single member district plan for electing judges to the Monterey County Municipal Court District, can be created with each district containing approximately 35,000 persons. Under such a ten single member district plan, at least two geographically compact districts can be created each consisting of more than a 50% Latino eligible voter population. One of the Latino eligible voter population majority districts would be located in the East Salinas area. The second eligible voter population majority district would be located in the south county area.

a. The creation of such a ten single member district plan divides the municipal boundaries of the City of Salinas. The Latino eligible voter population majority district for the City of Salinas under such a ten single member district plan cannot be created unless the municipal boundaries are divided by the district boundaries.

b. Such a ten single member district plan consisting of two Latino eligible voter majority districts cannot be created unless each of those two districts contain less than 40,000 persons.

8. In a report prepared by Professor O.V. Burton,

elections in Monterey County were analyzed and Professor Burton concluded that there were high levels of racially polarized voting. Report at pp. 12 - 13 (See table 1 for a summary of election analysis). The elections analyzed consisted of four county wide contests in 1986 (State Proposition 63; Justice Cruz Reynoso confirmation election; two municipal court elections), two county wide elections in 1990 (State Superintendent for Public Instruction; County District Attorney election), and one district election for the Hartnell Community College Trustees in 1991.

a. Latino communities in Salinas, Castroville-Pajaro Valley, and south county areas are each politically cohesive.

b. These elections contained evidence of Anglo bloc voting which defeated the electoral choices of the Latino community.

(1) Out of all of the votes in Monterey County cast "No" in the retention election of California State Supreme Court Justice Cruz Reynoso, held on November 4, 1986, 69.1% of the votes were cast by voters in precincts with 90% or more non Spanish surname voters.

(2) Out of all of the votes in Monterey County cast "Yes" in favor of having English as the Official Language, in an election held on November 4, 1986, 69.8% of the votes were cast by voters in precincts with 90% or more non Spanish surname voters.

(3) Out of all of the votes in Monterey County cast in favor of "Dean Flippo," in an election for Monterey County District Attorney held on June 5, 1990, 68.3% of the votes were cast by voters in precincts with 90% or more non Spanish surname voters.

(4) Out of all of the votes in Monterey County cast in favor of non Spanish surname

candidates for the office of California State Superintendent of Schools, in an election held on June 5, 1990, 66.1% of the votes were cast by voters in precincts with 90% or more non Spanish surname voters.

9. There have been instances of discrimination in Monterey County that have touched upon the right of Latinos to register, vote, and participate in the political process.

a. In a 1895, the State of California adopted an English literacy requirement in order to vote. In Monterey County, the English literacy requirement was enforced as late as the 1960's. In order to vote in elections in Monterey County, a registered voter had to be "... [a]ble to read the Constitution in English ..." "Voters' Guide," Salinas Californian, February 28, 1966, at page 22 A. The English literacy requirement served to discriminate against those persons in Monterey County who do not speak or understand English.

b. On March 4, 1977, the United States Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. Section 1973 c, issued a letter of objection against Monterey County. Monterey County failed to demonstrate that its bilingual election procedures did "... not have the effect of denying or abridging the vote on account of membership in a language minority group." Pl. Exh. N. 24, at p. 8, Alonzo Gonzalez, et al v. Monterey County, Civil Action No. C-91-20736 WAI, admitted into evidence, Transcript Vol. XI, at p. 1613, November 17, 1992.

c. On February 26, 1993, the United States Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. Section 1973 c, issued a letter of objection against Monterey County. Monterey County failed to demonstrate that its December 21, 1992, supervisor redistricting plan was not adopted pursuant to a discriminatory purpose and did not have a discriminatory effect. The

Attorney General stated:

Our examination of the county's demographics reveals a discrete concentration of Hispanic population in and near the City of Salinas that provides the basis for a supervisorial district in which Hispanics comprise at least a plurality of the citizen voting age population. The boundaries of the proposed redistricting plan, however, divide a heavily Hispanic area in the southern portion of the City of Salinas from the remainder of proposed District 1, while a heavily white non-Hispanic area of roughly equivalent population in the northern portion of the city is included in proposed District 1.

The proposed redistricting plan appears deliberately to sacrifice federal redistricting requirements, including a fair recognition of Hispanic voting strength, in order to advance the political interests of the non-minority residents of northern Monterey County.

d. During the time period from 1890 to 1992, not a single Hispanic served on the Monterey County Board of Supervisors, Alonzo Gonzalez, et al. v. Monterey County, 808 F.Supp. 727, 734 (N.D.Cal. 1992).

e. Monterey County is unable to establish that several of Monterey County's judicial district consolidation

ordinances, which were the subject of this Court's Order dated March 31, 1993, did not have the effect of denying the right to vote to Hispanics in Monterey County due to the retrogressive effect several of these ordinances had on Hispanic voting strength.

10. In elections to the Monterey County Municipal Court District, Monterey County has used the functional equivalent of a numbered place or post system. Such a numbered place or post system impairs the opportunity for the Latino community to elect the candidates of choice of the Latino community. City of Rome v. United States, 446 U.S. 156, 183 - 185, 100 S.Ct. 1548, 1565 - 1566 (1980).

11. Certain socio-economic factors in the areas of education, language, employment, health, and housing have affected members of the Latino community and may hinder their ability to participate effectively in the political process.

a. The 1980 Census reported that out of the total population of persons in Monterey County who were 25 years of age or over and who completed four years of high school the Spanish Origin population consisted of only 11% of such total population. The comparable figure for the non-Spanish Origin population was 89%. Pl. Exh. No. 2, Alonzo Gonzalez, et al v. Monterey County, Civil Action No. C-91-20736 WAI, admitted into evidence, Transcript Vol. XI, at p. 1603, November 17, 1992.

b. The 1980 Census reported that out of the total population of persons in Monterey County who were 25 years of age or over and who completed four or more years of college, the Spanish Origin population consisted of only 4% of such total population. The comparable figure for the non-Spanish Origin population was 96%. Pl. Exh. No. 2, Alonzo Gonzalez, et al v. Monterey County, Civil Action No. C-91-20736 WAI, admitted into evidence, Transcript Vol. XI, at p. 1603, November 17, 1992.

c. The 1990 Census reported that out of the total

population of persons in Monterey County who were 25 years of age or over and who completed four years of high school, the Spanish Origin population consisted of only 19% of such total population. The comparable figure for the non-Hispanic Origin population was 81%. Pl. Exh. No. 3, Alonzo Gonzalez, et al v. Monterey County, Civil Action No. C-91-20736 WAI, admitted into evidence, Transcript Vol. XI, at p. 1603, November 17, 1992.

d. The 1990 Census reported that out of the total population of persons in Monterey County who were 25 years of age or over and who had a bachelor's degree, the Spanish Origin population consisted of only 5% of such total population. The comparable figure for the non-Hispanic Origin population was 95%. Pl. Exh. No. 3, Alonzo Gonzalez, et al v. Monterey County, Civil Action No. C-91-20736 WAI, admitted into evidence, Transcript Vol. XI, at p. 1603, November 17, 1992.

e. The 1980 Census reported that in all of the following categories, Spanish Origin employed persons 16 years and over in Monterey County constituted the following percentages of all of the employed persons 16 years and over in Monterey County for each category: 7.6% managerial and professional specialty occupation; 12.5% technical sales and administrative support; 17.9% service occupations; 70.4% farming, forestry, and fishing occupations; 18.5% precision production, craft and repair, 32.7% operators, fabricators, and laborers. Pl. Exh. No. 4, Alonzo Gonzalez, et al v. Monterey County, Civil Action No. C-91-20736 WAI, admitted into evidence, Transcript Vol. XI, at p. 1603, November 17, 1992.

f. The 1980 Census reported that 9% of the total civilian force (persons 16 years and over) in Monterey County was unemployed. Spanish Origin persons (persons 16 years and over) which were unemployed comprised 4% of the total civilian force in Monterey County. Pl. Exh. No. 5, Alonzo Gonzalez, et al v. Monterey County, Civil Action No. C-91-

20736 WAI, admitted into evidence, Transcript Vol. XI, at p. 1603, November 17, 1992.

g. The 1990 Census reported that 8% of the total civilian force (persons 16 years and over) in Monterey County was unemployed. Spanish Origin persons (persons 16 years and over) which were unemployed comprised 5% of the total civilian force in Monterey County. Pl. Exh. No. 6, Alonzo Gonzalez, et al v. Monterey County, Civil Action No. C-91-20736 WAI, admitted into evidence, Transcript Vol. XI, at p. 1603, November 17, 1992.

h. The 1980 Census reported that 91% of the total civilian force in Monterey County was employed. Only 21% of the Spanish Origin labor force was employed in Monterey County. Pl. Exh. No. 7, Alonzo Gonzalez, et al v. Monterey County, Civil Action No. C-91-20736 WAI, admitted into evidence, Transcript Vol. XI, at p. 1603, November 17, 1992.

i. The 1990 Census reported that 92% of the total civilian force in Monterey County was employed. Only 27% of the Spanish Origin labor force was employed in Monterey County. Pl. Exh. No. 8, Alonzo Gonzalez, et al v. Monterey County, Civil Action No. C-91-20736 WAI, admitted into evidence, Transcript Vol. XI, at p. 1603, November 17, 1992.

j. The 1990 Census reported 12% of the total population for Monterey County was below the poverty level. The comparable figure for the Hispanic Origin population in Monterey County was 21%. Pl. Exh. No. 10, Alonzo Gonzalez, et al v. Monterey County, Civil Action No. C-91-20736 WAI, admitted into evidence, Transcript Vol. XI, at p. 1603, November 17, 1992.

k. The mean income in 1979 for all families in Monterey County was \$ 23,894. The comparable figure for Spanish Origin families was \$ 17,213. Pl. Exh. No. 11, Alonzo Gonzalez, et al v. Monterey County, Civil Action No.

C-91-20736 WAI, admitted into evidence, Transcript Vol. XI, at p. 1603, November 17, 1992.

l. The mean income in 1989 for all households in Monterey County was \$ 43,185. The comparable figure for Spanish Origin households was \$ 32,233. Pl. Exh. No. 12, Alonzo Gonzalez, et al v. Monterey County, Civil Action No. C-91-20736 WAI, admitted into evidence, Transcript Vol. XI, at p. 1603, November 17, 1992.

m. The 1990 Census reported that of all of the persons five years and over, 31,432 or 9.6% were persons who spoke Spanish at home and did not speak English well or not at all. Pl. Exh. No. 13, at p. 5, Alonzo Gonzalez, et al v. Monterey County, Civil Action No. C-91-20736 WAI, admitted into evidence, Transcript Vol. XI, at p. 1604, November 17, 1992.

n. The 1990 Census reported that of all of the persons five years and over in households, 29,636 or 9.8% were persons who Spanish at home and were linguistically isolated. Pl. Exh. No. 13, at p. 5, Alonzo Gonzalez, et al v. Monterey County, Civil Action No. C-91-20736 WAI, admitted into evidence, Transcript Vol. XI, at p. 1604, November 17, 1992.

o. The 1990 Census reported that out of the 57,218 owner occupied housing units in Monterey County, 8,853 or 15.5% were owned by Hispanic Origin householders. Pl. Exh. No. 13, at p. 22, Alonzo Gonzalez, et al v. Monterey County, Civil Action No. C-91-20736 WAI, admitted into evidence, Transcript Vol. XI, at p. 1604, November 17, 1992.

p. The 1990 Census reported that out of the 55,747 renter occupied housing units in Monterey County, 16,327 or 29.3% were rented by Hispanic Origin householders. Pl. Exh. No. 13, at p. 22, Alonzo Gonzalez, et al v. Monterey County, Civil Action No. C-91-20736 WAI, admitted into evidence, Transcript Vol. XI, at p. 1604, November 17, 1992.

q. The 1990 Census reported that the total number of persons per occupied housing units in Monterey County was 2.96. The comparable figure for the Hispanic Origin population in Monterey County was 4.34. Pl. Exh. No. 13, at p. 23, Alonzo Gonzalez, et al v. Monterey County, Civil Action No. C-91-20736 WAI, admitted into evidence, Transcript Vol. XI, at p. 1604, November 17, 1992.

r. The 1990 Census reported that the total number of occupied housing units in Monterey County lacking complete plumbing facilities was 773. Out of this number, 360 or 46.8% were occupied by Hispanic Origin householders. Pl. Exh. No. 13, at p. 29, Alonzo Gonzalez, et al v. Monterey County, Civil Action No. C-91-20736 WAI, admitted into evidence, Transcript Vol. XI, at p. 1604, November 17, 1992.

12. Non a single Hispanic has ever been appointed or elected to the Monterey County Municipal Court District. Two Hispanic candidates sought election to the Monterey County Municipal Court District in 1986. Both Hispanic candidates were unsuccessful.

13. There are several provisions of the California State Constitution and California State Law that are applicable to any attempt by the Board of Supervisors to create an election plan for Municipal Court Judges in Monterey County. The most critical provisions are as follows:

a. Article VI, Section 5 of the State Constitution provides that each county is to be divided into Municipal Court Districts as provided by statute; however a city may not be divided into more than one district and each Municipal Court District must have more than 40,000 residents.

b. Article VI, Section 16 of the State Constitution provides that Municipal Court Judges must be elected in their respective counties or districts at general elections.

c. Government Code Section 71040 provides that the Board of Supervisors is empowered to divide the county

into judicial districts for the purpose of electing judges and may change district boundaries and create other districts. Government Code Section 71040 also provides that no city shall be divided as to lie within more than one district.

d. Government Code Section 73560 and 73562 provides for the establishment and maintenance of a one court district, called the "Monterey County Municipal Court District", which encompasses the entire County of Monterey and consists of ten judges.

e. Government Code Section 71042 authorizes the submission of various proposals from the California Judicial Council with a view toward creating a greater number of full time judicial offices, equalizing the work of the judges, expediting judicial business, and improving the overall administration of justice.

f. Elections Code Section 25300 provides for separate judicial offices for each judicial position to be filled at each election.

14. The Board of Supervisors at an open and public meeting on March 14, 1994, specifically reviewed and considered several proposals for the election of judges in Monterey County and has found that each one of these proposals violate at least one provision of state law. The following is a list of each proposal reviewed by the Board of Supervisors and a citation to the provisions of state law which are violated by each respective plan:

a. Map 1 is a two district plan that generally follows the boundaries of Supervisorial District No. 3 and includes all of the City of Salinas within proposed District No. 2. This proposal violates Government Code Sections 73560 and 73562. Although this map would create a Municipal Court District with a total Latino population of approximately 55%, the Latino population only consists of approximately 32% of the total voting age citizens. A copy of Map 1 is attached to this stipulation as Exhibit "C".

b. Map 2 is also a two district plan similar to Map

1 except that this plan essentially establishes the southern boundary of proposed District No. 2 at just south of Greenfield rather than the southern county line. This proposal would also violate Government Code Section 73560 and 73562. This map only slightly improves Latino voting strength and total population percentages from that contained in Map. 1. A copy of Map 2 is attached to this stipulation as Exhibit "D".

c. Map 3 is also a two district plan that generally follows the boundaries of the Third Supervisorial District. This map however divides the City of Salinas. The split of the City of Salinas has the effect of greatly improving overall Latino voting strength as well as total Latino population in proposed District No. 2. Latinos would comprise approximately 70% of the entire population of this district and constitute a slight plurality of 46% of the voting age citizens. This proposal violates Article VI, Section 5 of the State Constitution, as well as Government Code Section 73560 and 73562. A copy of Map 3 is attached to this stipulation as Exhibit "E".

d. Map 4 is substantially similar to Map 2; however, this proposal also splits the City of Salinas and concentrates Latino population within the proposed District No. 2. This proposal would create a district with a total Latino population of just over 73% and the percentage of Latino voting age citizens would be almost 50%. This proposal violates Article VI, Section 5 of the State Constitution, as well as Government Code Sections 73560 and 73562. A copy of Map 4 is attached to this stipulation as Exhibit "F".

e. Map 5 is a two district proposal that is designed solely to maximize Latino voting strength and does not follow any other recognized boundaries. Under this proposal the total Latino population would be 81% and the Latino voting age citizens would comprise 61%. This

proposal would also violate Article VI, Section 5 of the State Constitution as well as Government Code Sections 71040 and 73560. A copy of Map 5 is attached to this stipulation as Exhibit "G".

f. Map 6 is a three district plan that essentially creates a separate Municipal Court District for the City of Salinas, a separate district for the Salinas Valley and North County, and a separate district for the Monterey Peninsula and the Big Sur Coast. Although Latinos would comprise almost 50% of the total population in the Salinas district and nearly 55% in the Salinas Valley-North County District, the percentage of Latino voting age citizens would be less than one-third in each of these districts. This proposal would violate Government Code Sections 73560 and 73562. A copy of Map 6 is attached to this stipulation as Exhibit "H".

g. Map 7A is a proposal substantially consistent with the proposed Second Stipulation and Order presented to the Court by the plaintiffs and the County. This plan would retain a single district for Monterey County and divide the County into four "divisions," "election areas," or "sub-districts". One judge each would be elected from proposed Division Nos. 1, 2, and 3; seven judges would be elected from Division No. 4. These subareas would only be used for election purposes and candidates would not need to be residents of the division or election area in which he or she is elected. This plan would violate Article VI, Section 16, of the California Constitution. A copy of Map 7A is attached to this stipulation as Exhibit "I".

h. Map 7B is a slight modification of Map 7A. This particular map provides for greater deviation by removing Carmel Valley and portions of the Big Sur Coast from the proposed Division No. 3 and places this territory in proposed Division No. 4. This plan also violates Article VI, Section 16, of the California Constitution. A copy of Map 7B is attached to this stipulation as Exhibit "J".

i. Map 8, is a ten district plan that divides the entire county into ten separate Municipal Court Districts. Each of the districts are less than 35,000 and the plan also calls for dividing the City of Salinas between Municipal Court Districts. Under this plan Latinos would constitute a substantial portion of the total population of three of the districts and would have a slight plurality of the voting age citizens in these three districts. This plan violates Article VI, Section 5 of the State Constitution as well as Government Code Section 71040, 73560, and 73562. A copy of Map 8 is attached to this stipulation as Exhibit "K".

j. Map 9 would divide the County into one district but provide for ten "resident areas" as described in Map 8. Under this plan each judicial post would be allocated to one of the ten resident areas and only persons residing within each resident area could be elected to the post assigned to such area. Elections would be held at large within the entire county and within the boundaries of the one Municipal Court District. There is no authority under California Law to allow the establishment of resident areas for judicial elections and the proposal would violate Elections Code Section 25300. The districts in Exhibit "K" would be the "resident areas" of this map.

k. Map 10 consists of one district for all of Monterey County and it also would not divide the County into any other subareas. Pursuant to this plan, elections would be conducted utilizing a limited or cumulative voting method. There is no authority under State Law for implementation of a limited or cumulative voting method for any elections in the State and would violate California Elections Code Section 25300.

15. The Board of Supervisors is unable to devise or prepare any plan for the election of municipal court judges in Monterey County that does not conflict with at least one state law and still comply with the Voting Rights Act.

DATED: 3/15, 1994, Respectfully submitted,

/s/
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DATED: 3/15, 1994, JOAQUIN G. AVILA
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By /s/
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Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
BEFORE THE HONORABLE RONALD M. WHYTE, JUDGE
THE HONORABLE MARY SCHROEDER, JUDGE
THE HONORABLE JAMES WARE, JUDGE

VICKY M. LOPEZ,
CRESENCIO PADILLA,
WILLIAM A. MELENDEZ,
JESSE G. SANCHEZ,
AND DAVID SERENA,

Plaintiffs,

vs.

MONTEREY COUNTY,
CALIFORNIA,
Defendant.

Case No. C-91-20559

Thursday, September 28, 1995
San Jose, California

Reporter's Transcript of Proceedings

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Thursday, September 28, 1995

THE CLERK: Calling case C-91-20559, Vicky Lopez versus Monterey County, on for status conference.

MR. AVILA: Joaquin Avila for the Plaintiffs

/

/

/

JUDGE WHYTE: Assuming we accepted your - - well, maybe not. Why would it necessarily be retrogressive?

MR. AVILA: In Miller versus Johnson there was a definition of retrogression which stated that if there was any reduction in minority voting strength, and when you have the plan, the temporary plan that was enacted and implemented, you have two Latino majority eligible voter districts which, along with the appointment of the governor, or by the governor, resulted in the election of two Latinos, well, the election of one Latino judge and one ran unopposed, if you compare that to an at-large district, that 50 percent is reduced to 34 percent population, and about 17 or 18 percent eligible voters.

That, under any standard, any retrogression standard that's been implemented by the Supreme Court and any other District Court, would constitute a step backwards for that reason.

(2)
No. 95-1201



In the Supreme Court

OF THE United States

OCTOBER TERM, 1995

VICKY M. LOPEZ, CRESCENCIO PADILLA,
WILLIAM A. MELENDEZ and DAVID SERENA,
Appellants,

v.

MONTEREY COUNTY, CALIFORNIA,
STATE OF CALIFORNIA,
Appellees,
STEPHEN A. SILLMAN,
Intervenor-Appellee.

On Appeal from the United States District Court
for the Northern District of California

MOTION TO DISMISS OR AFFIRM OF INTERVENOR STEPHEN A. SILLMAN

MARGUERITE MARY LEONI, ESQ.
Counsel of Record for Intervenor
Stephen A. Sillman
in his Official Capacity
as Presiding Judge of the
Monterey County Municipal Court
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QUESTIONS PRESENTED

In an action under section 5 of the Voting Rights Act, challenging unprecleared court consolidations which occurred after November 1, 1968, the date a jurisdiction became subject to section 5,

1. Was it error for the Three-Judge Court to refuse to extend its prior interim remedial election plan, and the judicial elections held thereunder, after the plan's drafters informed the court that the plan was solely motivated by race?
2. Was it error for the Three-Judge Court to order, on a one time basis only, at-large judicial elections in the unprecleared consolidated court, when substantial issues on the merits remained unresolved in the Three-Judge Court and the subject of ongoing proceedings, a return to the pre-1968 multi-court system was infeasible, and the prior interim remedial election plan proposed by Appellants and Appellee County, but ordered into effect by the court, was a plan conceded to be solely race-based?
3. Should this Court exercise jurisdiction over an appeal from an interlocutory order of the Three-Judge Court authorizing at-large judicial elections in the unprecleared consolidated court, when substantial issues on the merits remain unresolved in the Three-Judge Court, and ongoing proceedings below have the potential to moot this appeal?

TABLE OF CONTENTS

	<u>Page</u>
QUESTIONS PRESENTED	i
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS, AND FEDERAL REGULATIONS	2
INTEREST OF INTERVENOR.....	2
MOTION TO DISMISS OR AFFIRM	3
STATEMENT OF THE CASE	4
ARGUMENT	12
I. The Three-Judge Court Has Reopened The Merits Of Whether Appellants Are Even Entitled To A Remedy Under Section 5; At Least Until That Fundamental Question Is Decided A Reorganization Of The Municipal Court Is Not Warranted	12
II. The Three-Judge Court Did Not Err In Refusing To Continue In Effect The Interim Electoral Division Plan, Once It Was Informed Of The Plan's Exclusive Racial Motivation, And In Authorizing Remedial Elections In The Consolidated Municipal Court On A One-Time Basis ..	16
III. The Ongoing Proceedings In The Three-Judge Court On The Fundamental Question of Liability May Moot This Appeal	20
CONCLUSION	22
INDEX TO APPENDIX	23

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Brooks v. State Board of Elections</i> , 848 F. Supp. 1548 (S.D. Ga. 1994)	17
<i>City of Rome v. United States</i> , 446 U.S. 156 (1980)	17
<i>Clark v. Roemer</i> , 500 U.S. 646 (1991)	16
<i>Cowgill v. California</i> , 396 U.S. 371 (1970)	21
<i>DeWitt v. Wilson</i> , 856 F. Supp. 1409 (E.D. Cal. 1994) <i>aff'd, in part, dismissed in part</i> ____ U.S. ____, 115 S. Ct. 2637 (1995)	19
<i>Georgia v. United States</i> , 411 U.S. 526 (1973)	15
<i>Holder v. Hall</i> , ____ U.S. ____, 114 S. Ct. 2581 (1994)	18
<i>Katzenbach v. Morgan</i> , 384 U.S. 641 (1966)	17
<i>Lopez v. Monterey County</i> , 871 F. Supp. 1254 (N.D. Cal. 1995) .. 1, 5, 7, 10, 18, 20	
<i>Louisiana v. United States</i> , 380 U.S. 145 (1965)	19
<i>LULAC v. Clements</i> , 999 F. 2d 831 (5th Cir. 1993), <i>cert. denied</i> , ____ U.S. ____, 114 S. Ct. 878 (1993)	18
<i>Miller v. Johnson</i> , 575 U.S. ____, 115 S. Ct. 2475 (1995).....5, 8, 10, 15, 16, 19	
<i>Minick v. California Dept. of Corrections</i> , 452 U.S. 105 (1981)	22

TABLE OF AUTHORITIES (cont.)

Cases

	<u>Page</u>
<i>Nipper v. Smith</i> , 39 F. 3d 1494 (11th Cir. 1994) <i>cert. denied</i> , ____ U.S. ____, 115 S. Ct. 1794 (1995)	18
<i>Rescue Army v. Municipal Court of Los Angeles</i> , 331 U.S. 549 (1947)	21, 22
<i>Socialist Labor Party v. Gilligan</i> , 406 U.S. 583 (1972)	21
<i>United States v. Board of Commissioners of Sheffield, Alabama</i> , 435 U.S. 110 (1978)	15
<i>Voinovich v. Quilter</i> , 507 U.S. ____, 122 L. Ed. 2d 500 (1993)	16

Federal Constitutional Provisions

Fourteenth Amendment	2
----------------------------	---

Federal Statutes and Regulations

42 U.S.C. § 1973c	2
28 C.F.R. § 51.54	2
28 C.F.R. § 51.54(b)	22

State Constitutional Provisions

Cal. Const. art. VI, § 5(a)	11
Cal. Const. art. VI, § 16(b)	11

TABLE OF AUTHORITIES (cont.)

State Statutes and Rules

	<u>Page</u>
Cal. Gov't. Code § 71001 (Deering 1989)	11
Cal. Gov't. Code § 71140 (Deering 1989)	11
Cal. Gov't. Code § 72000 (Deering 1989)	11
Cal. Gov't. Code § 73560 (Deering 1995)	11
Cal. Rules of Court 532.5 (Deering 1995)	2
Cal. Rules of Court 532.6 (Deering 1995)	2

No. 95-1201

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1995

VICKY M. LOPEZ, CRESCENCIO PADILLA,
WILLIAM A. MELENDEZ and DAVID SERENA,
Appellants,

v.

MONTEREY COUNTY, CALIFORNIA,
STATE OF CALIFORNIA,
Appellees,

STEPHEN A. SILLMAN,
Intervenor-Appellee.

On Appeal from the United States District Court
for the Northern District of California

MOTION TO DISMISS OR AFFIRM OF
INTERVENOR STEPHEN A. SILLMAN

STATEMENT OF JURISDICTION.

Appellants have alleged jurisdiction under 42 U.S.C. § 1973c and 28 U.S.C. § 1253 to review an interlocutory order of a Three-Judge panel of the United States District Court for the Northern District of California entered on November 1, 1995 modifying a prior injunction entered on December 20, 1994. *Lopez v. Monterey County*, 871 F. Supp. 1254 (N.D. Cal. 1995). (J. S. App. 1.)

CONSTITUTIONAL AND STATUTORY PROVISIONS, AND FEDERAL REGULATIONS.

Fourteenth Amendment to The Constitution of the
United States

42 U.S.C. § 1973c (J. S. App. 85)

28 C.F.R. § 51.54 (J. S. App. 87)

INTEREST OF INTERVENOR.

Intervenor, Stephen A. Sillman, is the Presiding Judge of the Monterey County Municipal Court. Under the California Rules of Court, the Presiding Judge is responsible for all aspects of the timely, efficient and effective administration of justice by the court. Cal. Rules of Court 532.5 and 532.6 (Deering 1995).

Judge Sillman requested intervention in response to the interim remedial injunctive orders entered by the Three-Judge Court on December 20, 1994 and January 10, 1995. These orders established a temporary election division plan for the Municipal Court and an election schedule affecting eight of the Municipal Court's ten judges and requiring them to campaign for election in potentially a total of twenty-one primary and runoff elections in the following seventeen months. Judge Sillman believed that the time demands placed on the court's judges to campaign and fundraise for this number of elections in such a short period of time would be a substantial drain on the court's resources and severely burden its ability to adjudicate cases in a timely fashion, thus potentially affecting the constitutional and other rights of litigants. Accordingly, Judge Sillman sought intervention for the limited purpose of 1) requesting that the Three-Judge Court modify its orders and 2) participating in future proceedings concerning the potential effect of pro-

posed remedies on the official duties of the Municipal Court.¹

Judge Sillman was granted intervention on April 13, 1995 in his official capacity as Presiding Judge of the Monterey County Municipal Court "to protect the administration of justice in Monterey County."

MOTION TO DISMISS OR AFFIRM.

Judge Sillman believes that federal court interference in the organization and administration of the Municipal Court is not warranted until all aspects of the fundamental issue of liability under section 5 have been decided by the Three-Judge Court. Accordingly, in keeping with the purpose of his intervention, Intervenor moves to dismiss this appeal or affirm the Three-Judge Court's November 1, 1995 Order. This motion is made on the grounds that the issue of liability under section 5 has been reopened in the Three-Judge Court and is subject to ongoing proceedings in the lower court. At least until the predicate question of liability has been determined, a reorganization of the Municipal Court is not warranted. These ongoing proceedings also may moot the issues pending in this Court. Moreover, the Three-Judge Court's decision to refuse to continue in effect an interim remedial electoral division plan, after its drafters conceded that the plan was solely motivated by race, and to permit one-time remedial elections to be held in the unprecleared consolidated municipal court, was not an abuse of discretion.

¹ Intervenor Sillman has briefed other matters only pursuant to court order. (See App. 38a.)

STATEMENT OF THE CASE.

This is a lawsuit to enforce section 5 of the Voting Rights Act. Appellee, Monterey County (defendant below), became subject to section 5 as of November 1, 1968. Appellants allege that the County failed to obtain preclearance of numerous County ordinances enacted between 1972 and 1983 resulting in the consolidation of nine individual municipal and justice courts to form the county-wide Monterey County Municipal Court.² Appellants allege in this appeal that the Three-Judge Court erred in exercising its discretion to refuse to extend a prior interim election division plan when the court learned that that plan was motivated solely by race, and instead to authorize one-time elections in the consolidated Municipal Court system.

Appellants' Statement of Case omits critical facts demonstrating that the Three-Judge Court's November 1 Order was not an abuse of discretion. Appellants do not mention that the Three-Judge Court has recently joined the State of California as a defendant in this action and reopened the question of liability; that Appellants stipulated that they have not found any evidence of purposeful discrimination in the formation of the consolidated Municipal Court; that there have not been findings by any court concerning specific retrogressive effects of the consolidated Municipal Court, if any; that the Three-Judge Court specifically declined to accept the assertion by Appellants and the County that the consolidated Municipal Court was retrogressive in effect; that the County admitted at a hearing in September 1995 that a court-ordered, but County-designed electoral plan used for interim judicial elections during the prior June was solely motivated by racial considerations; and that

² As of November 1, 1968, there were two municipal courts and seven justice courts within Monterey County. These were separate legal entities, not districts of a single court. Some of these courts were very tiny, some were quite large. (See App. 49a & 50a.)

it is not possible to design an electoral system that complies with State law and also satisfies what Appellants believe to be the mandate of the Voting Rights Act, i.e., the creation of electoral divisions on the basis of the race of the voters.

Although the municipal courts of the State of California³ are created in the State Constitution and governed by the State Constitution and statutes, many of which specifically concern the Monterey County Municipal Court and were enacted after November 1, 1968, the Appellants did not name the State of California as a party and did not allege that any State statute required preclearance. Appellants successfully opposed the County's motion to join the State as a defendant. Thus, on March 31, 1993 the Three-Judge Court, on cross-motions for summary judgment, ruled only that the County consolidation ordinances were subject to preclearance, which had not been obtained, and ordered the County to do so within 90 days. See *Lopez v. Monterey County*, 871 F. Supp. at 256.

On August 10, 1993, the County filed an action for a declaratory judgment in the United States District Court for the District of Columbia seeking preclearance. The County, however, voluntarily dismissed the action on October 7, 1993. No evidence was presented to the court and the court made no findings on the question of retrogression. (App. 1a.)

Thereafter, Appellants and the County requested the Three-Judge Court to approve a stipulation for an order installing an electoral division plan for the 1994 Municipal Court elections.⁴ Appellants acknowledged that they had not discovered any evidence that Monterey County's adoption of

³ The State of California is not covered by section 5.

⁴ At the time, the Three-Judge Court did not know that race was the sole motivation in the design of the plan. This came to light at a hearing several months later which the Three-Judge Court held on the effect of

the consolidation ordinances had a discriminatory purpose or intent. Monterey County, however, stipulated that it was unable to establish that the consolidation ordinances did not have a retrogressive effect. (App. 4a and 12a.)

The plan also violated numerous provisions of the State Constitution and statutes. Accordingly, Appellants and the County also requested that the Three-Judge Court suspend the provisions of the State Constitution and statutes that the plan violated. (App. 5a-6a and 13a-14a.) On December 22, 1993, the State of California was granted leave to intervene to oppose the stipulation.

The Three-Judge Court declined to approve the stipulated order on the basis that "the court was not satisfied that the plan necessarily had to conflict with the California Constitution in order to comply with the Voting Rights Act." (App. 21a.) The Three-Judge Court ordered the County either to submit for preclearance an election plan that complied with the Voting Rights Act and State law or to show cause why it could not do so. The Three-Judge Court then "enjoined [the County] pending preclearance of a new election plan or further order of this court from holding an election for judges for the municipal court." (App. 25a.)

The County did not submit a plan for preclearance. Instead, it attempted to show cause why it was unable to do so and requested that the Court order the race-based electoral division plan into effect. The County stipulated that it was not possible to design an electoral plan that satisfied State law, as well as Appellants' view of what the Voting Rights Act required, the concentration of voters in particular divisions on the basis of race. (J.S. App. 107.) The United States Department of Justice filed a brief *amicus curiae* in

this Court's recent decision, *Miller v. Johnson*, 575 U.S. —, 115 S. Ct. 2475 (1995), on this case. (App. 38a.)

which it proposed as a remedy a return to the judicial system that existed prior to November 1, 1968. The Appellants and the County, however, rejected this proposal as practically infeasible and administratively unworkable. (App. 30a.)

On June 1, 1994, the Three-Judge Court again declined to approve the stipulated electoral division plan, continued in effect the injunction, and once again ordered the County to devise a plan that complied with the Voting Rights Act and State law, even if this required the County to seek amendments to the existing State law. The Three-Judge Court refused to reimpose the judicial system in effect in 1968, since "such an alternative is not a workable interim solution." (App. 30a and 32a.)

At a November 3, 1994 Status Conference, the County reported that it had been unsuccessful in securing the legislative changes necessary to develop an electoral division plan in accordance with the court's June 1 order and again requested that the Three-Judge Court implement the stipulated electoral division plan. The State objected on the ground that the racially drawn electoral division plan violated the Equal Protection Clause, among other grounds.

In an order filed on December 20, 1994, the Three-Judge Court, noting that no case cited by the State concluded that racially drawn election divisions violated the Equal Protection Clause, finally acceded to the County's and Appellants' request that the court approve the election division plan. The Three-Judge Court acknowledged that the plan violated the State Constitution and that it was not possible to return to the electoral system in effect in 1968, a remedy no party advocated, but expressed serious concern that continuance of its injunction against any elections at all deprived Monterey County voters of their constitutional right to vote. Therefore, the court ordered one-time only elections in the proposed election division plan pending the implementation of a permanent legislative solution. The Three-Judge Court

ordered that the terms of those elected would expire on the first Monday in January, 1997. *Lopez v. Monterey County*, 871 F. Supp. 1254. The Three-Judge Court ordered the County to submit the interim electoral division plan for preclearance. The County did so, and preclearance was obtained from the United States Department of Justice on March 6, 1995. (App. 35a.)

On June 29, 1995, this Court issued its decision in *Miller v. Johnson*, 575 U.S. —, 115 S. Ct. 2475 (1995). That decision raised grave doubts about the constitutionality of the interim electoral division plan. On September 7, 1995, the Three-Judge Court ordered briefing from the parties regarding the impact of *Miller v. Johnson* in connection with a September 28, 1995 Status Conference. (App. 38a.) Although the United States Department of Justice received notice, it did not file a pre-hearing brief. (App. 39a-42a.)⁵

At the Status Conference, the Three-Judge Court conducted a lengthy hearing on the County's progress towards development of a permanent plan, on the constitutionality of the interim electoral division plan, and on remedies. The United States Department of Justice did not attend the hearing. (App. 39a-42a.)

At the hearing, counsel for the County conceded:

I will be the first one to admit the reasons for the rationale for the boundaries were in fact race generated. There is no question about it. That was the *sole motivation*.

(App. 43a, emphasis added.)⁶

⁵The Department of Justice did file a brief in October after the Three-Judge Court issued a specific order requesting it do so.

⁶A full transcript is included in Intervenor's Appendix to Response to Application to Stay. See Attachment 13. Numerous other factors support the County's concession. The County and Appellants stipulated

The Three-Judge Court thus found itself confronted with an exceedingly difficult situation: the interim electoral division plan violated the State Constitution and was conceded by its drafter to be solely motivated by race, thus most likely violative of the Equal Protection Clause; return to the pre-November 1, 1968 election scheme was not feasible; the County stipulated that it was unable to devise any plan that satisfied both Appellants' racial goals and State law; the consolidated Municipal Court in effect between 1983 and 1991 had not been precleared, but the parties had stipulated that there was no evidence that the consolidation ordinances had been adopted for a discriminatory purpose; moreover, there were no findings about retrogression, only the County's stipulation that it could not prove that the consolidation ordinances did not have a retrogressive effect. Also, pursuant to the December 20, 1994 Order, the terms of those elected in June 1995 expired in January, 1997. Therefore, in order for the Municipal Court to have judges and continue to function after January 1997, the Three-Judge Court was required to exercise its equitable powers to fashion a remedy.

The Three-Judge Court had four possible options:

(1) Extend the duration of the race-based interim plan and thus continue indefinitely the terms of office of the judges elected thereunder;

to violations of the State law in order to satisfy racial percentage goals. (App. 5a-6a.) They stipulated that the electoral divisions would have no purpose other than to concentrate Hispanic voters. (App. 8a, 16a-18a.) The divisions did not correspond to the population whose cases were most likely to be heard by the judge elected in that division; residency in a division was not required in order to run for or maintain the judicial seat assigned to that division. (App. 8a.) The extraordinary configuration and demographics of the divisions reaffirm that race was the predominant concern. (See App. 51a & 52a.)

(2) Reinstitute the judicial system that was in effect prior to November 1, 1968, which no party advocated or desired as a remedy;

(3) Attempt to devise a court plan; or

(4) Order one-time remedial elections in the consolidated Monterey County Municipal Court which, although not precleared, was not created for a discriminatory purpose.

The Three-Judge Court, having been advised by the County of the exclusive racial motivation in the design of the electoral plan, chose the option which did not violate State or Federal constitutional rights, and ordered a single county-wide election of Municipal Court judges in the general election in 1996, but enjoined elections thereafter pending preclearance of a permanent plan. (J. S. App. 8.)

On the issue of retrogression, the Three-Judge Court noted that there was no evidence of purposeful discrimination and that it did not "accept the stipulation between the County and plaintiffs that the County was unable to establish that the consolidation ordinances did not have a retrogressive effect." (J. S. App. 3.)⁷ The Three-Judge Court expressly ruled:

[G]iven the reasoning of *Miller*, the court cannot say that a county-wide election plan is necessarily unlawfully retrogressive in comparison with the prior plan or the system in effect prior to the consolidation ordinances.

(J. S. App. 7.)

⁷ Appellants have devoted several pages of their Jurisdictional Statement to a discussion of data typically relevant to a section 2 claim. See J. S. at 3-6. This case does not involve a section 2 claim. The Three-Judge Court expressly stated that it had not made any finding that the consolidation ordinances violated section 2. *Lopez v. Monterey County*, 871 F. Supp. at 1258, n. 4.

At the Status Conference, the State of California strenuously argued, among other points, that the Municipal Courts were creatures of the State, created in the State Constitution,⁸ and formed and administered pursuant to superseding State law,⁹ not County ordinance. The State also argued that since it was not a jurisdiction covered by section 5, its statutes did not need to be precleared.

⁸ At the time of the filing of the complaint, article VI, section 5(a) of the California Constitution provided:

(a) Each county shall be divided into municipal court and justice court districts as provided by statute, but a city may not be divided into more than one district. Each municipal and justice court shall have one or more judges.

There shall be a municipal court in each district of more than 40,000 residents and a justice court in each district of 40,000 residents or less. The number of residents shall be ascertained as provided by statute.

The Legislature shall provide for the organization and prescribe the jurisdiction of municipal and justice courts. It shall prescribe for each municipal court and provide for each justice court the number, qualifications, and compensation of judges, officers, and employees.

At the November 8, 1994 General Election, the voters enacted an amendment to article VI, section 5 eliminating all justice courts. Municipal court judges are required to run in retention elections. The California Constitution guarantees to the electors of the lower courts the right to vote for all the judges of that court. Cal. Const. art. VI, § 16(b). Vacancies on a municipal court are almost always filled by gubernatorial appointment. *Id.* In 1995, California Governor Wilson appointed two Hispanics and one African-American Judge to the Monterey County Municipal Court.

⁹ Numerous State statutes comprehensively regulate the organization and administration of the courts. See, e.g., Cal. Gov't. Code §§ 71001 et seq., 72000 et seq. (Deering 1989); see also Cal. Gov't. Code §§ 73560 et seq. (Deering 1995) for provisions specifically applicable to the Monterey County Municipal Court. A statute also requires that municipal court judges be residents within the boundaries of the court they serve. Cal. Gov't. Code § 71140 (Deering 1989).

In its November 1, 1995 Order, the Three-Judge Court ruled that "the State clearly must be brought into this action in order to bring about a complete resolution of the issues." The Three-Judge Court vacated its March 31, 1993 order to the extent it denied the County's motion to join the State, and joined the State. (J. S. App. 8.)

The State answered the Complaint on November 16, 1995. (See Apps. 7 and 8 of the State's Motion to Dismiss or Affirm.) The State denied the material allegations of the Complaint and asserted several affirmative defenses including, among others, that the action had been rendered moot by the enactment of a State statute subsequent to the consolidation ordinances which currently controlled the election of municipal court judges in Monterey County, that the municipal courts are creatures of the State Constitution and statutes, not local ordinances, and that, since the State is not a jurisdiction covered by section 5, its laws affecting voting do not need to be precleared.

After the State filed its Answer, Appellants filed a brief in the Three-Judge Court maintaining that, despite the pendency of this appeal, the Three-Judge Court had jurisdiction to proceed on the merits of a First Amended Complaint which they proposed to file. (App. 44a.) A status conference is scheduled for September 6, 1996.

ARGUMENT.

I. The Three-Judge Court Has Reopened The Merits Of Whether Appellants Are Even Entitled To A Remedy Under Section 5; At Least Until That Fundamental Question Is Decided A Reorganization Of The Municipal Court Is Not Warranted.

This is not the usual section 5 enforcement action in which, prior to issuance of an injunction, the Three-Judge Court has determined that section 5 applies and that the

defendants have not complied. These questions have not been fully determined below. Until these fundamental questions are decided, there is no justification for disrupting the organization of the Municipal Court and the administration of justice.

In its November 1, 1995 Order, the Three-Judge Court expressly declined to rule that the consolidation of the Municipal Court was retrogressive. The court also reopened the liability phase with regard to the State's answer and defenses. (J. S. App. 2, n. 2.)

The Three-Judge Court clearly expects that, should the State prevail in its contentions, the Court's injunction against holding municipal court elections will be lifted and the action dismissed. The Three-Judge Court ruled:

The court also reconsiders its prior decision that the State should not be joined as an indispensable party. Since the State now argues that "in conducting municipal court elections, the County is not 'administering' its consolidation ordinances at all, but is instead 'administering' a *state statute* that defines the municipal court district to encompass the entire County," (citation omitted), the State clearly must be brought into this action in order to bring about a complete resolution of the issues. If the State believes that the County is only administering a State statute and that the failure to preclear the consolidation ordinances is of no significance, it can seek to lift the injunction and have this Section 5 litigation dismissed.

(J. S. App. 7-8, original emphasis.)

The State's answer to the Complaint presents the issues of whether the County is administering a superseding State statute in conducting Municipal Court elections; whether the State statutes concerning the Municipal Court consolidation supersede and preempt County ordinances on the

same subject; whether the State of California, a jurisdiction not covered by section 5, is required to obtain preclearance; if preclearance was required, whether it was obtained; if the State is in violation of section 5, what is an appropriate remedy in light of the Equal Protection Clause, the State Constitution (which has not been challenged), the lack of any evidence on the central issue of retrogression, and the State interests embodied in the organization of its judicial system?

These contentions have not been ruled upon by the Three-Judge Court. If it finds that the State is correct in its contentions, the Three-Judge Court's injunction will be lifted and the case dismissed. These issues will be litigated simultaneously with proceedings on this appeal.

Appellants agree that the merits are yet to be fully decided. Appellants said in their brief concerning the Three-Judge Court's continuing jurisdiction:

The [U.S. Supreme Court] appeal does not challenge any aspects of the November 1, 1995, Order which are not related to the implementation of the temporary court-ordered election plan. Thus, the District Court has continuing jurisdiction to address plaintiffs' anticipated filing of the First Amended Complaint, [and] any issues related to the merits of this action,

(App. 45a.)

While this Court has upheld the constitutionality of section 5 when properly applied, this Court has been exceedingly wary of section 5's extraordinary nature and potential for abusive application. This Court said in *Miller v. Johnson*:

In *South Carolina v. Katzenbach*, 383 U.S. 301, 15 L.Ed.2d 769, 86 S. Ct. 803 (1966), we upheld § 5 as a necessary and constitutional response to some states' "extraordinary stratagem[s] of contriving new rules of

various kinds for the sole purpose of perpetuating voter discrimination in the face of adverse federal court decrees." *Id.*, at 335, 16 L.Ed.2d 769, 86 S. Ct. 803 (footnote omitted); (additional citations omitted). But our belief in *Katzenbach* that the federalism costs exacted by § 5 preclearance could be justified by those extraordinary circumstances does not mean they can be justified in the circumstances of this case.

Miller, 575 U.S. at —, 115 S. Ct. at 2493; *Georgia v. United States*, 411 U.S. 526, 545 (1973) (Powell, J., dissenting) ("[Section 5] is indeed a serious intrusion, incompatible with the basic structure of our system, for federal authorities to compel a State to submit its legislation for advance review."); *United States v. Board of Commissioners of Sheffield, Alabama*, 435 U.S. 110, 141 (1978) (Stevens, J., joined by Burger, C.J., and Rehnquist, J., dissenting) ("[Section 5's] so-called 'preclearance' requirement is one of the most extraordinary remedial provisions in an act noted for its broad remedies. Even the Department of Justice has described it as a 'substantial departure . . . from ordinary concepts of our federal system'; its encroachment on state sovereignty is significant and undeniable." Footnote omitted; ellipsis in opinion).

Principles of federalism and judicial restraint apply when a federal court is asked to interfere with a state's judiciary, especially when anchored in a state's sovereign constitution and statutes which have not been determined to be in violation of any federal law. This Court in *Miller v. Johnson* also cautioned federal courts against intruding in vital local governmental functions, unless demonstrated to be absolutely necessary by strong evidence.

Federal court review of districting legislation represents a serious intrusion on the most vital of local functions. It is well settled that "reapportionment is primarily the

duty and responsibility of the state." (Citations omitted.)

Miller, 575 U.S. at ____, 115 S. Ct. at 2488; see also *Voinovich v. Quilter*, 507 U.S. ____, 122 L. Ed. 2d 500 (1993):

Federal courts are barred from intervening in state apportionment in the absence of a violation of federal law precisely because it is the domain of the States, and not the federal courts, to conduct apportionment in the first place. . . . [T]he federal courts are bound to respect the States' apportionment choices unless those choices contravene federal requirements.

Id., at 507 U.S. at ____, 122 L. Ed. 2d at 513.

Clearly, until the fundamental issue of liability has been determined, the dramatic power accorded federal courts and the United States Department of Justice to require a restructuring of the County judicial system should not be exercised.

II. The Three-Judge Court Did Not Err In Refusing To Continue In Effect The Interim Electoral Division Plan, Once It Was Informed Of The Plan's Exclusive Racial Motivation, And In Authorizing Remedial Elections In The Consolidated Municipal Court On A One-Time Basis.

This Court in *Clark v. Roemer*, 500 U.S. 646, 654 (1991) recognized that there may be exigent circumstances in which elections can be held using unprecleared electoral changes. This is such a case.¹⁰

¹⁰ Appellants claim that the consolidated Municipal Court could not be used for a one-time remedial election because the precleared interim electoral division plan became a bench-mark for evaluating any subsequent plans. First, that plan was ordered into effect *before* the Three-Judge Court knew about its exclusive racial motivation. This also ignores

While return to the *status quo ante* is the standard remedy in section 5 enforcement cases (*City of Rome v. United States*, 446 U.S. 156, 182 (1980)), liability is a predicate to such a remedy. Moreover, neither Appellants nor the County advocated this solution. Since the Three-Judge Court reopened the question of liability, it would not have been proper for it to resurrect the system of individual municipal and justice courts that existed prior to November 1, 1968. The reasons are obvious.

Not only would such an arrangement be unconstitutional and otherwise illegal under the current State Constitution and statutes,¹¹ it would result in administrative chaos for the Municipal Court. For example, courtrooms would need to be instituted in all of the resurrected justice courts, administrative personnel hired (e.g., clerk, bailiffs, etc.), and other provisions made for court administration. These courts would also be without judges. Provision would need to be made for their election or appointment, or seven of the current judges would need to be arbitrarily assigned to the justice courts and the remaining three judges split between

the clear language of 28 C.F.R. § 51.54(b) that a "bench mark" is the "last legally enforceable practice or procedure used by the jurisdiction." The interim electoral plan was not "legally enforceable" by any measure. Appellants and the County concede that the plan is unconstitutional under the Constitution of the State of California. Only by virtue of the Three-Judge Court's December 20, 1994 order could it be implemented. Moreover, it would be extraordinary indeed if a districting plan that was based solely on race, could ever constitute a section 5 benchmark.

¹¹ It has been suggested that section 5 authorizes federal courts simply to disregard state laws. *Katzenbach v. Morgan*, 384 U.S. 641 (1966). But in *Katzenbach*, the state law itself was challenged and was found to be in direct conflict with the Voting Rights Act. Compare *Brooks v. State Board of Elections*, 848 F. Supp. 1548, 1569 (S.D. Ga. 1994), a Voting Rights Act case in which the court refused to approve a consent decree changing the state's system for electing judges in a manner that violated state law "without either a voluntary amendment or a judicial determination that the system violates federal law."

the two municipal courts. This would impose a tremendous burden on the two municipal courts which have by far the largest populations and caseloads.¹² See *Lopez v. Monterey County*, 871 F. Supp. at 1259, n.7. Even if all of this could be accomplished, neither state nor local funding accounts for these resurrected courts which no longer exist. Resurrecting them also presents serious jurisdictional problems.¹³

The Three-Judge Court also was under no obligation to perpetuate the interim electoral division plan once it was informed that its sole motivation was the concentration of voters on the basis of race. Appellants mischaracterize the Three-Judge Court's concerns as mere "reservations" about the constitutionality of the interim electoral plan. (J. S., at 19, n. 17.) This ignores the County's statement that race was the sole motivation.¹⁴

¹²For example, under the 1990 Census the Gonzales Justice Court would have a population of 7,880; the Salinas Judicial District would have a population of 146,858. (App. 50a.)

¹³The Department of Justice suggests that the Three-Judge Court could have modified the pre-November 1, 1968 system. (Memo. On App. for a Stay, at 11-12.) This would have been a standardless task resulting in a system violative of both current and former State law. Compare, section 2 cases *Nipper v. Smith*, 39 F. 3d 1494, 1532 (11th Cir. 1994), *cert. denied*, ____ U.S. ____, 115 S. Ct. 1794 (1995), citing *Holder v. Hall*, ____ U.S. ____, 114 S. Ct. 2581, 2586 (1994) and *LULAC v. Clements*, 999 F. 2d 831, 871 (5th Cir. 1993), *cert. denied*, ____ U.S. ____, 114 S. Ct. 878 (1993). Moreover, it would have been extraordinary for the Three-Judge Court to undertake the legislative task of designing a completely new judicial system in Monterey County when the issue of liability had been reopened.

¹⁴Amicus Department of Justice notes that "*Miller* . . . does not hold that the consideration of race as a factor in designing electoral districts is impermissible." (Memo. On App. For Stay, at 13, emphasis added.) Here, race was conceded to be the *sole factor*, traditional organizational principles for municipal courts were not considered. Compare *DeWitt v. Wilson*, 856 F. Supp. 1409 (E.D. Cal. 1994) *aff'd, in part, dismissed, in part* ____ U.S. ____, 115 S. Ct. 2637 (1995). Amicus Department of

Appellants assert that *Miller* does not constrain the remedial options of the Three-Judge Court once it was determined that the County ordinances had not been precleared. But Federal courts must implement a remedy which addresses the discriminatory features of a successfully challenged election system. See *Louisiana v. United States*, 380 U.S. 145, 154 (1965) ("We bear in mind that the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future").

In this case, there have been no concrete findings by any court concerning the specific nature of the alleged retrogressive effects, if any, of the consolidation ordinances. The County's stipulation that it could not disprove retrogression does not suffice under *Miller*.¹⁵ This is especially true when Appellants had stipulated that there was no evidence of purposeful discrimination.

The Department of Justice has criticized the Three-Judge Court for not fashioning its own remedial plan once it learned that the interim electoral division plan was solely race-based. This ignores the fact that the parties had tried to develop a legal plan for years and finally the County stipulated that there was no alternate election division plan consistent with State law and which satisfied the Appellants'

Justice asserts that the Three-Judge Court did not give the interim plan proper consideration because the court should have held a hearing on its constitutionality under *Miller v. Johnson*. This is incorrect. The court did hold a lengthy hearing on September 28, 1995 preceded by full briefing on the effect of *Miller v. Johnson* on this case. Amicus Department of Justice chose not to appear.

¹⁵Under *Miller v. Johnson*, the proponents of a race-based plan must demonstrate a "strong basis in evidence of the harm being remedied." *Miller*, 575 U.S. at ____, 115 S. Ct. at 2491. "Blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis." *Id.* (quoting *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 500-501 (1989)).

view of the mandates of the Voting Rights Act, racially drawn divisions. (J. S. App. 103-107.) See also *Lopez v. Monterey County*, 871 F. Supp. at 1257. Moreover, as to the issue of retrogression, the Three-Judge Court remained totally without standards in devising a remedial plan as there were no findings on retrogression. Moreover, the very issue of liability had been reopened below.

Under the exigent circumstances described above ordering remedial elections in the consolidated Municipal Court was a proper exercise of equitable discretion. The November 1, 1995 Order also maintains the administrative integrity of the Municipal Court and provides a stable environment in which to administer justice by providing for a single remedial election in accordance with state law, and normal six-year terms for those elected, ample time for the question of liability in this case to be finally decided.

III. The Ongoing Proceedings In The Three-Judge Court On The Fundamental Question of Liability May Moot This Appeal.

Exercising prudential discretion, this Court has often declined an appeal even when jurisdiction is technically present. As Chief Justice Rehnquist stated in *Socialist Labor Party v. Gilligan*, 406 U.S. 583 (1972):

This Court has recognized in the past that even when jurisdiction exists it should not be exercised unless the case "tenders the underlying constitutional issues in clear cut and concrete form." *Rescue Army v. Municipal Court*, 331 U.S. 549, 584, 91 L.Ed. 1666, 1686, 67 S. Ct. 1409 (1947). Problems of prematurity and abstractness may well present "insuperable obstacles" to the exercise of the Court's jurisdiction, even though that jurisdiction is technically present. *Id.*, at 574, 91 L.Ed. at 1681.

Socialist Labor Party, 406 U.S. at 588 (footnote omitted).

In *Socialist Labor Party*, this Court dismissed an appeal as abstract, hypothetical, and premature, in a case in which changes in the law rendered most of the issues moot, except for a single challenge which received scant attention in the complaint. The nature of the injury suffered was also speculative.

Given the procedural posture of this case, in which the merits have been reopened, similar concerns exist. None of the preclearance issues raised by the State have been determined in the court below. Until that determination, the injury to Appellants, if any, is wholly speculative. Moreover, the Three-Judge Court's ruling could render the issues in this appeal moot. Elections for Municipal Court judges should not be enjoined or the administration of the court disrupted until liability and injury have been demonstrated.

The Court has declined to exercise jurisdiction based on such prudential concerns. For example, in *Cowgill v. California*, 396 U.S. 371 (1970), this Court granted a motion to dismiss in a case presenting the question of whether displaying a mutilated American flag is protected speech. Justice Harland, with Justice Brennan concurring, explained their reasons for granting the motion. While the question was a substantial one, the record failed to "flush the narrower and predicate issue of whether there is a recognizable communicative aspect to appellants conduct" This predicate question had not been determined by the court below. Therefore, exercising prudential discretion over its jurisdiction, the Court dismissed the appeal.

Similarly here, the predicate issue of whether Appellants are entitled to relief has not been fully determined by the Three-Judge Court. Compare *Minick v. California Dept. of Corrections*, 452 U.S. 105 (1981) in which the Court dismissed a petition for certiorari since the record below was ambiguous and the federal question might have been affected by additional proceedings in the State courts. See

also *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549 (1947).

In this case, the construction of section 5, its application to the State of California, and the relationship of the State statutes and County ordinances have not been resolved. Until those issues are settled, a decision by this Court on the Questions Presented by Appellants may well be wholly advisory, hypothetical, or rendered moot by further proceedings below.

CONCLUSION.

The November 1, 1995 Order of the Three-Judge Court should be affirmed or, in the alternative, the appeal should be dismissed.

Respectfully submitted,

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Index to Appendix*

1. Stipulated Dismissal of Civ. Action No. 93-1639 (CRR, SSH, KLH (U.S.C.A.), United States District Court for the District of Columbia filed October 7, 1993	1a
2. Parties Stipulation and Court Order (November, 1993)	3a
3. Parties Second Stipulation and Court Order (January, 1994)	11a
4. Order Requiring Submission Of Election Plan For Preclearance Alternative Order to Show Cause; Order Enjoining Election Pending Preclearance, filed March 1, 1994	20a
5. Order Granting United States' Motion To Participate As Amicus Curiae; Enjoining Elections Pending Preclearance; And Denying Motion To Vacate Judicial Appointments Or Shorten Terms, dated June 1, 1994	26a
6. United States Department of Justice Preclearance Letter, dated March 6, 1995	35a
7. Order Re Briefing For Status Conference, filed September 7, 1995	38a
8. Selected Portions of Reporter's Transcript of Status Conference of September 28, 1995	42a
9. Plaintiff's Notice Regarding Continuing District Court's Jurisdiction, dated February 8, 1996	44a
10. Map of Monterey County Courts Prior to November 1, 1968 and Demographic Data	49a
11. Monterey County Municipal Court Districts (i.e. The December 20, 1994 Interim Election Division Plan) Map and Summary Table (Full size copy of map has been lodged with the Clerk of the Court	51a

* Originals have not been modified to correct typographical and other types of errors.

APPENDIX 1

1a

Civil Action No. 93-1639
(CRR, SSH, KLH (U.S.C.A.))

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED OCT. 7, 1993

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

COUNTY OF MONTEREY, CALIFORNIA
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant,

and

VICKI M. LOPEZ, et al.
Defendant-Intervenors.

STIPULATED DISMISSAL

It is hereby stipulated, by and between counsel for all parties hereto, as follows:

1. All claims presented by the complaint herein shall be dismissed without prejudice pursuant to Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure.
2. Each party shall bear its own costs and attorneys' fees except as otherwise agreed to by Joaquin Avila, counsel for the intervenors, and Monterey County in the memorandum

of agreement executed by and between them on October 4, 1993.

Dated: October 7, 1993

/s/ KATHLEEN McGUAN (by MDR)

Counsel for Plaintiff

Monterey County, California

/s/ MARY D. RODRIGUEZ

Counsel for Defendant

United States of America

/s/ JOAQUIN AVILA (by MDR)

Counsel for Intervenors

Vicki M. Lopez, et al.

APPENDIX 2

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Civil Action No.
 C-91-20599-RMW (EAI)

IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF
 CALIFORNIA

VICKY M. LOPEZ, CRESCENCIO PADILLA,
 WILLIAM A. MELENDEZ, JESSE G. SANCHEZ,
 and DAVID SERENA,
Plaintiffs,

v.

MONTEREY COUNTY, CALIFORNIA
Defendant.

PARTIES STIPULATION AND COURT ORDER
 Voting Rights Action
 Three Judge Court

The Plaintiffs, Vicky M. Lopez, *et al.*, and Defendant
 Monterey County, California, in order to permit the adop-
 tion of an election area plan for the election of Municipal

PARTIES STIPULATION AND COURT ORDER

Judges to the Monterey County Municipal Court District hereby stipulate as follows:

1. Both Plaintiffs and the Defendant want to settle this litigation to enforce Section 5 of the Voting Rights Act and avoid any further litigation.

2. As a result of this Court's Order dated March 31, 1993, Defendant Monterey County was required to submit municipal court judicial district consolidation ordinances, which were adopted between 1968 and 1983, for approval pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973 c. As a result of this Court's Order, Monterey County filed a declaratory judgment action pursuant to Section 5 seeking judicial approval of these consolidation ordinances. *Monterey County v. United States of America*, Civil Action No. 93-1639 (CRR) (D.C. Dist. Colum. 1993). By an Order filed on September 7, 1993, the United States District Court for the District of Columbia permitted the Plaintiffs in this action to intervene as defendants-intervenors in the *Monterey County v. United States of America* action.

3. Plaintiffs acknowledge that as of the date of this Stipulation they had not discovered any evidence that Monterey County's adoption of the municipal court judicial district consolidation ordinances had the purpose or the intent of denying or abridging the right to vote within the meaning of Section 5 of the Voting Rights Act. Monterey County, however, stipulates that it is unable to establish that these ordinances did not have the effect of denying the right to vote to Hispanics in Monterey County due to the retrogressive effect several of these ordinances had on Hispanic voting strength in Monterey County. For this reason, Monterey County agreed not to enforce these municipal court judicial district consolidation ordinances in future elections

PARTIES STIPULATION AND COURT ORDER

for the Monterey County Municipal District Court. As a result of this agreement, the United States of America, Monterey County, and the *Lopez, et al.*, defendants-intervenors stipulated to a dismissal of the action in the District of Columbia federal court.

4. Monterey County and the Plaintiffs in this action have agreed to the implementation of an election area plan for the election of municipal court judges to the Monterey County Municipal Court District. This agreement only affects the electoral process and does not affect the county wide jurisdiction of the Monterey County Municipal Court District. The California State Constitution provides that municipal court judges "shall be elected in their counties or districts at general elections." [Cal. Const. Art. VI, Sec. 16(b).] Arguably this provision requires that all municipal court judges be elected within the entire boundaries of the district. To the extent that this provision inhibits or prevents the ability of Monterey County to adopt and implement an election area plan for the election of municipal court judges to the Monterey County Municipal Court District, the application of this provision to Monterey County must be suspended.

5. Both Monterey County and the Plaintiffs believe that if the application of this provision is not suspended, insofar as such provision affects Monterey County and the election of municipal court judges, Monterey County will not be able to adopt and implement any election plan for municipal court judges which will secure the necessary approval pursuant to Section 5 of the Voting Rights Act. Should Monterey County not be permitted to implement an election area plan which secures the requisite Section 5 approval, then this Court will be faced with the task of fashioning a court-ordered plan or ordering the County of Monterey to revert to the implementation of the last lower court district plan in

PARTIES STIPULATION AND COURT ORDER

effect at the time Monterey County became a covered jurisdiction under the Voting Rights Act, evidenced in County Ordinance No. 1347, as amended by Ordinance No. 1597, and which consisted of two municipal court districts, with two municipal court judges sitting in each such district, and seven justice court districts with one justice court judge in each such district. In order to avoid any additional expenditure of judicial resources, Monterey County and the Plaintiffs have agreed to the implementation of an election area plan, as generally described in the proposed Order, which will secure the requisite Section 5 approval. Nevertheless, the suspension of the aforementioned provision of state law, to the extent an election area plan is inconsistent with such provision, is necessary to comply with the Voting Rights Act.

6. Monterey County seeks to have in place an election area plan for the election of municipal judges to the Monterey County Municipal Court District in time for the commencement of the June 1994 election process. The June 1994 election process commences on December 27, 1993 with the time period for the issuance of petitions for gathering signatures in lieu of filing fees. West's Ann.Cal.Elec.Code § 6555(b).

7. Monterey County will seek Section 5 approval of an election area plan, consistent with the Order, from the United States Attorney General. Representatives from the United States Attorney General have informed us that expedited review of the election area plan submission will be given serious consideration to accommodate the impending election schedule. In view of the impending election schedule, Monterey County will submit an election area plan to the United States Attorney General for expedited review. Once Section 5 approval is secured and this Court agrees to

PARTIES STIPULATION AND COURT ORDER

suspend the operative effect of the aforementioned provision, the election area plan can be implemented in time for the June 1994 elections. Should this Court not grant the requested Order, then proceedings should be initiated for the implementation of a court-ordered plan.

DATED: November 22, 1993

JOAQUIN G. AVILA
BARBARA Y. PHILLIPS

By: /s/ JOAQUIN G. AVILA
JOAQUIN G. AVILA
Attorney for Plaintiffs

DATED: November 19, 1993

DOUGLAS C. HOLLAND

By: /s/ DOUGLAS C. HOLLAND
DOUGLAS C. HOLLAND
Attorney for Defendant
Monterey County, California

ORDER

Based upon the Parties Stipulation, this Court hereby ORDERS that the application of Article VI, Section 16(b) of the California State Constitution is hereby suspended only for Monterey County, California, in order to permit Monterey County to adopt and implement a election area plan for municipal court judges which will secure the requisite approval pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973 c. Monterey County has stipulated that the municipal court judicial district consoli-

PARTIES STIPULATION AND COURT ORDER

dation ordinances, which are the subject of this Section 5 enforcement action, result in a retrogression of minority voting strength. Accordingly, Monterey County dismissed its declaratory judgment action seeking Section 5 approval of these county ordinances. The Section 5 declaratory judgment action was filed in the United States District Court for the District of Columbia and was styled *Monterey County v. United States of America*, Civil Action No. 93-1639 (CRR) (D.C. Dist. Colum. 1993).

Monterey County is hereby ordered to adopt a Municipal Court District Election Plan that contains the following minimum components:

1. There will be one Municipal Court District. This District will be county-wide. All municipal court judges, regardless of residency or election area, will serve the entire county and can be assigned to any judicial assignment or any court location. Assignments will be made without regard to residency or election area.

2. The initial Election Area Plan shall consist of seven election areas. An election area will be a specific geographic area in which only the persons residing may vote. These election areas shall be used solely for the purpose of electing municipal court judges. These election areas shall not be used for any other purpose, including, but not limited to, the assignment of cases or court locations. Three of the election areas will be two-judge election areas; four of the election areas will be one judge election areas.

3. The Election Area Plan shall comply with the requirements of the Voting Rights Act and each election area shall be nearly equal in population as may reasonably be achieved with the understanding that each two judge election area shall be approximately twice the size in population as a single judge election area.

PARTIES STIPULATION AND COURT ORDER

4. The Board of Supervisors of the County will be responsible for the designation of incumbent judges to specific election areas. The Board of Supervisors in its sole discretion may decline to designate specific judges to specific election areas and if it so elects, no incumbent will be so designated and such undesignated seats will be considered open seats.

5. Nothing in this plan shall be deemed to prohibit or limit in any way any otherwise qualified person, including any current municipal court judge, to pursue election to any municipal court seat in any election area, except that any judge running for election in an election area that he or she has not been designated as the incumbent, shall not be considered an incumbent and such judge shall not use the designation of "incumbent" in any such election.

6. The terms of office of Judges Robert Moody, Stephen Sillman, and Wendy Duffy will not be affected by the adoption of this plan.

7. There shall be no residency requirement other than residency in the County for election to any seat on the municipal court bench. Residency in a specific election area shall not be required.

8. Nothing in this plan shall limit or restrict in any way the ability of the County to determine the location of courtrooms or the staffing of courtrooms.

The Court hereby suspends only for Monterey County, California, the application of Article VI, Section 16(b) of the California State Constitution to permit Monterey County to comply with the federal requirements of Section 5 of the Voting Rights Act insofar as such constitutional provision may inhibit or prevent the implementation of the election area plan as described in this Order. The Parties

PARTIES STIPULATION AND COURT ORDER

shall advise this Court of any administrative action taken by the United States Attorney General pursuant to Section 5 of the Voting Rights Act with respect to the approval of any election area plan for the election of municipal court judges for the Monterey County Municipal Court District.

Panel: Circuit Judge Mary M. Schroeder
District Judge James Ware
District Judge Ronald M. Whyte

DATED: _____
MARY M. SCHROEDER
United States Circuit Judge

DATED: _____
JAMES WARE
United States Circuit Judge

DATED: _____
RONALD M. WHYTE
United States Circuit Judge

PARTIES STIPULATION AND COURT ORDER

APPENDIX 3

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Civil Action No. C-91-20559-RMW (EAI)
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

VICKY M. LOPEZ, CRESCENCIO PADILLA,
WILLIAM A. MELENDEZ, JESSE G. SANCHEZ
and DAVID SERENA,
Plaintiffs,

v.

MONTEREY COUNTY, CALIFORNIA,
Defendant,
STATE OF CALIFORNIA,
Defendant-Intervenor.

**PARTIES SECOND STIPULATION AND
COURT ORDER**

Voting Rights Action
Three Judge Court

The Plaintiffs, Vicky M. Lopez, *et al.*, and Defendant
Monterey County, California in order to permit the adoption
of an election system for the election of Municipal Judges to

Second Stip. & Order

the Monterey County Municipal Court District hereby stipulate as follows:

1. Both the Plaintiffs and the Defendant want to settle this litigation to enforce Section 5 of the Voting Rights Act and avoid any future litigation.

2. As a result of this Court's Order dated March 31, 1993, Defendant Monterey County was required to submit municipal court judicial district consolidation ordinances, which were adopted between 1968 and 1983, for approval pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973 c. As a result of this Court's Order, Monterey County filed a declaratory judgment action pursuant to Section 5 seeking judicial approval of these consolidation ordinances. *Monterey County v. United States of America*, Civil Action No. 93-1639 (CRR) (D.C. Dist. Colum. 1993). By an Order filed on September 7, 1993, the United States District Court for the District of Columbia permitted the Plaintiffs in this action to intervene as defendants-intervenors in the *Monterey County v. United States of America* action.

3. Plaintiffs acknowledge that as of the date of this Stipulation they had not discovered any evidence that Monterey County's adoption of the municipal court judicial district consolidation ordinances had the purpose or the intent of denying or abridging the right to vote within the meaning of Section 5 of the Voting Rights Act. Monterey County, however, stipulates that it is unable to establish that these ordinances did not have the effect of denying the right to vote to Hispanics in Monterey County due to the retrogressive effect several of these ordinances had on Hispanic voting strength in Monterey County. For this reason, Monterey County agreed not to enforce these municipal court judicial district consolidation ordinances in future elections

Second Stip. & Order

for the Monterey County Municipal District Court. As a result of this agreement, the United States of America, Monterey County, and the *Lopez, et al*, defendants-intervenors stipulated to a dismissal of the action in the District of Columbia federal court.

4. Monterey County and the Plaintiffs in this action have agreed to the implementation of an election system for the election of municipal court judges to the Monterey County Municipal District Court. This agreement only affects the electoral process and does not affect a municipal court's countywide jurisdiction. Both the Plaintiffs and the Defendants agree that the Monterey County Municipal Court District shall be divided into four divisions. For the purpose of election of judges, the term "division" as used in this stipulation and proposed Court Order is and shall continue to be the "district" referred to in subdivision (b) of Section 16 of the Article VI of the Constitution of the State of California. Except as otherwise expressly provided in this paragraph, the term "district" as used in this stipulation and proposed Court Order shall mean a countywide municipal court district and shall be the "district" referred to in Section 5 of Article VI of the Constitution of the State of California and Chapters 6 and 8 of Title 8 of the Government Code of the State of California.

5. Both Monterey County and the Plaintiffs believe that if this Court does not approve and issue the Order as proposed, Monterey County will not be able to adopt and implement any election system for municipal court judges which will secure the necessary approval pursuant to Section 5 of the Voting Rights Act. Should Monterey County not be permitted to implement a Municipal Court Division Plan which secures the requisite Section 5 approval, then this Court will be faced with the task of fashioning a court-

Second Stip. & Order

ordered plan. In order to avoid any additional expenditure of judicial resources, Monterey County and the Plaintiffs have agreed to the implementation of a Municipal Court Division Plan, as generally described in the proposed Order, which will secure the requisite Section 5 approval. Any conflict between any California law and the provisions of this Order should be resolved in favor of the Order, in order to ensure full compliance with the Voting Rights Act.

6. Monterey County seeks to have in place a Municipal Court Division Plan for the election of municipal judges to the Monterey County Municipal District Court in time for the commencement of the June 1994 election process, at least insofar to ensure elections in two of the proposed divisions. The Plaintiffs and Monterey County have previously provided the Court with an amended election schedule which will permit the June 1994 election process to proceed.

7. Monterey County will seek Section 5 approval of the Municipal Court Division Plan, consistent with the Order, from the United States Attorney General. Representatives from the United States Attorney General have informed us that expedited review of the Municipal Court Division Plan submission will be given serious consideration to accommodate the impending election schedule. In view of the impending election schedule, Monterey County will submit a Municipal Court Division Plan to the United States Attorney General for expedited review. Once Section 5 approval is secured, the Municipal Court Division Plan can be implemented in time for the June 1994 elections. Should this Court not grant the requested Order, then proceedings

Second Stip. & Order

should be initiated for the implementation of a court-ordered plan and an appropriate election schedule.

DATED: January 13, 1994

JOAQUIN G. AVILA
BARBARA Y. PHILLIPS

By: /s/ JOAQUIN G. AVILA
JOAQUIN G. AVILA
Attorney for Plaintiffs

DATED: January 13, 1994

DOUGLAS C. HOLLAND

By: /s/ DOUGLAS C. HOLLAND
DOUGLAS C. HOLLAND
Attorney for Defendant
Monterey County

ORDER

Based upon the Parties Stipulation, this Court hereby ORDERS Monterey County to adopt and implement a Municipal Court Division Plan for municipal court judges which will secure the requisite approval pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973 c. Monterey County has stipulated that the municipal court judicial district consolidation ordinances, which are the subject of this Section 5 enforcement action, result in a retrogression of minority voting strength. Accordingly, Monterey County dismissed its declaratory judgment action seeking Section 5 approval of these county ordinances. The Section 5 declaratory judgment action was filed in the

Second Stip. & Order

United States District Court for the District of Columbia and was styled *Monterey County v. United States of America*, Civil Action No. 93-1639 (C.R.R.) (D.C. Dist. Colum. 1993). Monterey County has further stipulated that it is unable to adopt a plan without guidance and direction of this Court.

Monterey County is hereby ordered to adopt a Municipal Court Division Plan that contains the following minimum components:

1. There will be one Municipal Court District. This District will be county-wide. All municipal court judges, regardless of residency or division area, will serve the entire county and can be assigned to any judicial assignment or any court location. Assignments will be made without regard to residency or division area. For the purpose of this Order, the term "district" is and shall be the "district" referred to in Section 5 of Article VI of the Constitution of the State of California and Chapters 6 and 8 of Title 8 of the Government Code of the State of California.

2. The initial Municipal Court Division Plan shall consist of four divisions. A division will be a specific geographic area in which only the persons residing may vote. These judicial divisions shall be used solely for the purpose of electing municipal court judges. These divisions shall not be used for any other purpose, including, but not limited to, the assignment of cases or court locations. Three of the divisions will be one judge divisions. The fourth division shall consist of seven judges. For the purpose of election of judges, the term "division" as used in this Order is and shall be the "district" referred to in subdivision (b) of Article VI of the Constitution of the State of California.

Second Stip. & Order

3. The Municipal Court Division Plan shall comply with the requirements of the Voting Rights Act.

4. The Board of Supervisors in consultation with the Judges of the Municipal Court Bench at a public meeting conducted concurrently with Board consideration and adoption of the Municipal Court Division Plan, shall designate judges to specific divisions and establish an election schedule for the conducting of elections for terms of office that would otherwise expire on January 2, 1995. In the event the Board and the judges can not agree, designations to divisions shall be accomplished by lottery, conducted by the Board at such public meeting and elections for offices that were previously scheduled to expire on January 2, 1995, shall be conducted pursuant to the modified election schedule attached to this Order as Attachment "A". In making the designations described above and establishing an election schedule, each division in which a racial or ethnic minority comprises at least a majority of the population in such division shall be allocated one vacant judicial position, if such position or positions exist, and regardless of whether any vacancy exists, elections shall be conducted in such divisions pursuant to the modified election schedule attached to this Order as Attachment "A".

5. Nothing in this Municipal Court Division Plan shall be deemed to prohibit or limit in any way any otherwise qualified person, including any current municipal court judge, to pursue election to any municipal court seat in any division.

6. The terms of office of Judges Robert Moody, Stephen Sillman, and Wendy Duffy will not be affected by the adoption of this Municipal Court Division Plan.

Second Stip. & Order

7. There shall be no residency requirement other than residency in the County for election to any seat on the municipal court bench. Residency in a specific division shall not be required.

8. Nothing in this Municipal Court Division Plan shall limit or restrict in any way the ability of the County to determine the location of courtrooms or the staffing of courtrooms.

9. The Municipal Court Division Plan shall become operative on January 2, 1995.

10. To the extent the provisions of this Order are inconsistent with the provisions of any provision of the California State Constitution or any statute of the State of California, the provisions of this Order shall prevail and control.

11. The Parties shall advise this Court of any administrative action taken by the United States Attorney General pursuant to Section 5 of the Voting Rights Act with respect to the approval of any Municipal Court Division Plan for the election of municipal court judges for the Monterey County Municipal Court District.

Second Stip. & Order

Panel: Circuit Judge Mary M. Schroeder
District Judge James Ware
District Judge Ronald M. Whyte

Dated: _____
MARY M. SCHROEDER
United States Circuit Judge

Dated: _____
JAMES WARE
United States Circuit Judge

Dated: _____
RONALD M. WHYTE
United States Circuit Judge

Second Stip. & Order

APPENDIX 4

NO. C 91 20559 RMW (EAI)
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

FILED MARCH 1, 1994; RICHARD W. WIEKING;
CLERK, U.S. DISTRICT COURT, NORTHERN DIS-
TRICT OF CALIFORNIA, SAN JOSE

VICKY M. LOPEZ, CRESCENCIO PADILLA,
WILLIAM A. MELENDEZ, JESSE G. SANCHEZ,
and DAVID SERENA,
Plaintiffs,

v.

MONTEREY COUNTY, CALIFORNIA
Defendant

ORDER REQUIRING SUBMISSION OF ELECTION
PLAN FOR PRECLEARANCE; ALTERNATIVE
ORDER TO SHOW CAUSE; ORDER ENJOINING
ELECTION PENDING PRECLEARANCE

BACKGROUND

In its order dated March 31, 1993, this court found that certain Monterey County municipal court judicial district consolidation ordinances, which were adopted between 1968 and 1983, required preclearance pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. §1973 c, and that such preclearance had not been obtained. As a result of this court's order, Monterey County filed a declaratory judgment action pursuant to Section 5 in the United States District Court for the District of Columbia seeking judicial approval of these consolidation ordinances. *Monterey County v. United States of America*, Civil Action No. 93-1639 (CRR) (D.C. Dist. Colum. 1993). By an order filed on September 7, 1993, that court permitted the plaintiffs in this action to intervene. Monterey County, then, stipulated with plaintiffs that it would be unable to establish that these ordinances did

not have the effect of denying the right to vote to Latinos in Monterey County due to the retrogressive effect several of these ordinances had on Latino voting strength in Monterey County. Pursuant to the parties' stipulation, the action in the District Court for the District of Columbia was dismissed.

Monterey County and plaintiffs then agreed to the implementation of an election system for the election of municipal court judges to the Monterey County Municipal Court District and requested this court to order the County to adopt the system before preclearance. However, by order dated December 22, 1993 this court declined the request without prejudice because the court was not satisfied that a plan necessarily had to conflict with the California Constitution in order to comply with the Voting Rights Act. On January 13, 1994 the County and plaintiffs submitted a new stipulation and proposed order in response to the court's order of December 22, 1993. The new plan, in an attempt to comply with Section 5, also appears to conflict with certain provisions of the California Constitution and certain state laws.

ROLE OF THREE-JUDGE COURT

The role of the three-judge court entertaining an action under Section 5 of the Voting Rights Act is limited. In *City of Lockhart v. United States*, 460 U.S. 125, 129 n.3 (1983), the Court describes that role:

[The three-judge court determines] (1) whether a change was covered by § 5, (ii) if the change was covered, whether § 5's approval requirements were satisfied, and (iii) if the requirements were not satisfied, what remedy was appropriate. . . .

Since this court determined in its March 31, 1993 order that (1) the County's consolidation ordinances were covered by § 5 and (2) Section 5's approval requirements were not

satisfied, the question at this point is what remedy is appropriate. The remedy Section 5 contemplates is injunctive relief. *Brooks v. State Bd. of Elections*, 775 F.Supp. 1470, 1482 (S.D.Ga. 1989). In *Perkins v. Matthews*, 400 U.S. 379, 385 (1971) the Court pointed out what this court cannot do:

What is foreclosed to [the court] is what Congress expressly reserved for consideration by the District Court for the District of Columbia or the Attorney-General-the determination whether a covered change does or does not have the purpose or effect 'of denying or abridging the right to vote on account of race or color.'

The three-judge court has some limited discretion in fashioning the "appropriate remedy" to ensure that § 5's approval requirements are met. See e.g. *Perkins v. Matthews*, 400 U.S. 379, 396 (1971). In *N.A.A.C.P. v. Hampton County Election Commission*, 470 U.S. 166, 179 (1985) and *Berry v. Dole*, 438 U.S. 190, 192 (1978), the Supreme Court directed that appropriate relief under Section 5 should include an order allowing 30 days for the state to submit covered changes to the Attorney General for approval. In *Berry v. Dole*, the Court found that the District Court committed reversible error by not ordering the Peach County officials to seek preclearance of the voting change. *Berry v. Dole*, 438 U.S. 187, 193 (1978). Once the state has "successfully complied with the Section 5 approval requirements, private parties may enjoin the enforcement of the new enactment only in suits attacking its constitutionality; there is no further remedy provided by § 5." *Allen v. State Board of Elections*, 393 U.S. 544, 549-50 (1968).

CURRENT ISSUE BEFORE COURT

In the instant case, the parties acknowledge that any newly proposed election plan must be submitted for

preclearance to the Attorney General or the United States District Court for the District of Columbia. The plaintiffs and County submit that this court should at this time order adoption of their newly proposed plan before it is submitted for preclearance, because suspension of certain California constitutional provisions and statutes may be necessary in order for the plan to meet the requirements of the Voting Rights Act. The State and Judge Fields object to the court's ordering adoption at this point, as they claim that an insufficient showing has been made that a plan cannot be fashioned without conflicting with state requirements.

FINDING BY COURT

The court is not satisfied based upon the showing made to date that a new election plan for the election of Municipal Court judges must conflict with the California Constitution or any California statute in order to comply with the Voting Rights Act. Therefore, it makes the order set forth below.

ORDER

Good cause appearing, the County of Monterey is hereby ordered to submit forthwith to the Attorney General or the United States District Court for the District of Columbia a new election plan for preclearance that complies with the Voting Rights Act and does not violate the state constitution or any law of the State of California. If the County is unable to submit a new election plan that complies with the Voting Rights Act without violating a provision of the California Constitution or a law of the State of California, it shall show cause on March 31, 1994 at 1:30 p.m. in this court as to why it cannot do so. The showing should identify the specific constitutional provision or statute with which it cannot comply and the factual basis for its conclusion that it cannot comply. The factual basis should be supported by affidavit, stipulation of the parties, or other admissible evidence.

This factual showing should be filed and served on all parties at least 15 days before the hearing on the order to show cause and each party should file at least 5 days before the hearing any objections it has to the County's factual showing and state any issue on which it believes an evidentiary hearing is required. The court will then decide at the hearing on March 31, 1994 whether an evidentiary hearing will be necessary and, if not, whether the County should be ordered to adopt a plan that conflicts with state law in order to have a plan that it can submit for Section 5 preclearance to the Attorney General or the United States District Court for the District of Columbia.

The County is hereby enjoined pending preclearance of a new election plan or further order of this court from holding an election for judges for the municipal court.

DATED: February 28, 1994

/s/ RONALD M. WHYTE
RONALD M. WHYTE
United States District Judge
on Behalf of the Panel

Copy of Order mailed on March 1, 1994 to:

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Milpitas, CA 95035-7014

Barbara Y. Phillips
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San Francisco, CA 94110

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Salinas, CA 93901

Manuel Medeiros
Deputy Attorney General
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P.O. Box 944255
Sacramento, CA 94244-2550

APPENDIX 5

NO. C 91 20559 RHW (EAI)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

VICKY M. LOPEZ, CRESCENCIO PADILLA, WILLIAM A.
MELENDEZ, JESSE G. SANCHEZ, and DAVID SERENA,
Plaintiffs,

v.

MONTEREY COUNTY, CALIFORNIA
Defendant.

ORDER GRANTING UNITED STATES' NOTICE
TO PARTICIPATE AS AMICUS CURIAE;
ENJOINING ELECTIONS PENDING
PRECLEARANCE; AND DENYING MOTION TO
VACATE JUDICIAL APPOINTMENTS OR
SHORTER TERMS

BACKGROUND

In its order dated March 31, 1993, this court found that certain Monterey county municipal court judicial district consolidation ordinances, which were adopted between 1968 and 1983, required preclearance pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973 c, and that such preclearance had not been obtained. As a result of this court's order, Monterey County filed a declaratory judgment action pursuant to Section 5 in the United States District Court for the District of Columbia seeking judicial approval of these consolidation ordinances. *Monterey County v. United States of America*, Civil Action No. 93-1639 (CRR) (D.C. Dist. Colum. 1993). By an order filed on September 7, 1993, that court permitted the plaintiffs in this action to intervene. Monterey County then stipulated with plaintiffs that it would be unable to establish that these ordi-

nances did not have the effect of denying the right to vote to Latinos in Monterey County due to the retrogressive effect several of these ordinances had on Latino voting strength in Monterey County. Pursuant to the parties' stipulation, the action in the District Court for the District of Columbia was dismissed.

Monterey County and plaintiffs then agreed to the implementation of an election system for the election of municipal court judges to the Monterey County Municipal Court District and requested this court to order the County of Monterey to adopt the system before preclearance. However, by order dated December 22, 1993, this court declined the request without prejudice because the court was not satisfied that a plan necessarily had to conflict with the California Constitution in order to comply with the Voting Rights Act. On January 13, 1994 the County of Monterey and plaintiffs submitted a new stipulation and proposed order in response to the court's order of December 22, 1993. The new plan also conflicted with certain provisions of the California Constitution and certain state laws.

On March 1, 1994, this court ordered the County of Monterey to submit to the Attorney General or the United States District Court for the District of Columbia a new election plan for preclearance that complied with the Voting Rights Act and did not violate the state constitution or any law of the State of California. The court further ordered that if Monterey County were unable to submit a new election plan that complied with the Voting Rights Act without violating a provision of the California Constitution or a law of the State of California, it should show cause why it could not do so.

On March 16, 1994, in response to the order to show cause, Monterey County and plaintiffs submitted stipulations that included a list of 10 proposals and a citation to the state law violated by each respective plan. Stipulation 15

states that "[t]he Board of Supervisors is unable to devise or prepare any plan for the election of municipal court judges in Monterey County that does not conflict with at least one state law and still comply (sic) with the Voting Rights Act."

On May 3, 1994, this court issued a tentative order directing a county-wide election in November based upon an interim reapportionment plan. The court recognized that the interim plan, which was, in effect, the voting system implemented by the unprecleared ordinances, would not remedy the apparent discriminatory effect that the unprecleared voting system had on Latino voters. However, the court believed the interim plan, which called for shortened terms of those judges elected, would preserve the citizens' right to elect judges while a permanent legislative solution was being developed and a plan precleared. The court also felt that its interim plan created fewer problems than any of the solutions offered by the parties. The court allowed the parties until May 13, 1994 to file any comments or objections to its tentative order. All parties, except the State, filed responses raising questions about or objecting to the tentative order.

On May 13, 1994 the United States filed a motion for leave to participate as *amicus curiae* which the court hereby grants.

For the reasons set forth below, the court vacates its tentative order and hereby issues an injunction barring any elections for municipal court judges pending preclearance of a new voting system or further order of this court.

II. ANALYSIS

In its tentative order of May 3, 1994, the court concluded that the interests of the voters mandated holding an interim election under an unprecleared system pending Monterey

County's adoption and preclearance of a plan that complies with state and federal law. The court is now convinced that permitting the voters to cast ballots under a plan that has not been precleared and that has an apparent retrogressive effect on Latino voting strength would not be in the best interest of the voters.

The Supreme Court has indicated that the three-judge court has limited discretion in fashioning an appropriate remedy in Section 5 cases. See e.g., *Perkins v. Matthews*, 400 U.S. 379, 441 (1971). Section 5 contemplates the remedy of injunctive relief. *Brooks v. State Bd. of Elections*, 775 F.Supp. 1470, 1482 (S.D.Ca. 1989). In the instant case, an injunction pending preclearance is the most appropriate remedy.

Redistricting and reapportionment are "primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court," *Voinovich v. Guiltar*, — U.S. —, 113 S. Ct. 1149, 1157 (1993) (citation omitted). In the instant case, the County of Monterey has failed to devise and preclear a plan that conforms with both the Voting Rights Act and with state law. The very purpose of Section 5 is to require preclearance before changes can be put into effect, and to avoid using litigation by voters as the mechanism for testing changes in voting laws. See e.g., *McCain v. Lybrand*, 465 U.S. 236, 243-44 (1984).

This court has considered the possibility of ordering an election in accordance with one of the plans proposed by the County and plaintiffs. Under the plan preferred by them, one of the municipal court districts would have less than 40,000 residents in violation of Article VI, Section 5 of the California Constitution, the City of Salinas would be divided into two districts in violation of Government Code Section 71040, and there would not be congruity of electoral base and jurisdictional base as required by Article VI,

Section 16(b) of the California Constitution. The State objects to such a plan and argues that an elimination of the requirement of congruence between jurisdictional and electoral base would pose serious problems by depriving people of voting rights. The State urges that, in any interim or permanent solution, the court not suspend the state law requirements that municipal court judges stand election before all of the voters in the district over which they will preside and candidates for municipal court reside in the district of their election.

The court is satisfied that the adoption of a plan as currently proposed by Monterey County and plaintiffs as an interim solution would alter the structure embodied in the California constitution and statutes, would do too much violence to legislative and state interests, and would create more problems than it solves. In fashioning a redistricting plan "or in choosing among plans, district courts should not ... 'intrude upon state policy any more than necessary.'" *Upham v. Seamon*, 456 U.S. 35, 42 (1982) (citation omitted). In its amicus brief, the United States additionally proposed, as a possible option, implementation, on an interim basis, of the election scheme that was in effect for municipal judges on November 1, 1968. However, as plaintiffs and the County have noted, such an alternative is not a workable interim solution.

The court believes that the County and plaintiffs have acted in good faith in attempting to develop an appropriate plan, but the State has apparently not yet been involved in the process. The court recognizes that the task of developing a plan is a difficult one that will require plaintiffs, the County, and the State to work together. It also appears that a solution may require state legislative action. The United States, through its amicus brief, has now volunteered to assist the parties in devising a system that complies with the Voting Rights Act. Therefore, the court concludes that the

most appropriate remedy at this point is to enjoin an election pending preclearance of an appropriate redistricting plan and to allow the parties limited additional time to reach and implement a solution. If, however, the parties do not move forward expeditiously or are unable to reach a legislative solution, the court will have to take more drastic action including possible implementation of a judicially created redistricting plan. However, given the complexity of the problem, the fact that reapportionment tasks are best left to the legislature, and the fact that legislative solutions necessarily take some time, the court concludes that enjoining an election prior to preclearance is the most appropriate remedy at this time.

The court wishes to underscore the urgency with which it views Monterey County's responsibility to develop and preclear a plan that complies with state and federal law. The County is urged to promptly seek any legislative changes or changes in the administrative structure of its courts that may be necessary in order to expeditiously adopt and preclear a viable plan. The court has avoided developing its own plan only because it is convinced that the County has not neglected its legislative responsibilities and is committed to working with plaintiffs and the State to fulfill its reapportionment obligation.

In its motion for leave to participate *amicus curiae*, the United States has offered "to assist the parties in the development of an appropriate remedy if the court believes that such assistance would be beneficial." The State is currently a party to these proceedings. The court finds that it would be beneficial for the State and the United States to assist the County in the development and expedited preclearance of a plan that will comply with the Voting

Rights Act and with federal and California state law (or at least minimally intrude on state policy).¹

ORDER

1. Monterey County is ordered to develop a plan for the election of municipal court judges which complies with the Voting Rights Act and intrudes on state policy no more than necessary. The County shall take any steps required to obtain changes in existing state law or county ordinances. The State shall participate and assist in the County's development of such a plan.

2. Monterey County is hereby enjoined from holding elections for municipal court judges pending adoption and preclearance of a new plan. The court requests the cooperation and the assistance of the United States in the development and preclearance process.

3. The court orders the parties to appear at a status conference on November 3 at 1:30 p.m. to report on their progress at which time the court will determine whether sufficient steps have been taken to justify continuing the injunction in effect or whether some other remedy needs to be fashioned. The parties should be prepared to inform the court of measures taken to effect any legislative changes or changes in the County's administrative structure that may be necessary, of any alternative plans that have been developed, and of a timetable for the implementation and preclearance of a plan.

The motion by plaintiffs to vacate judicial appointments or shorten terms is denied. The governor's appointment powers are not the subject of the Section 5 proceedings and

¹The court has not foreclosed the possibility of authorizing a plan for preclearance that violates existing state law, if the court is satisfied that intrusion upon state policy is necessary.

the orderly administration of justice requires that vacancies by appropriately filled. Any judges appointed will have to face election under the new districting plan.

DATED: June 1, 1994

By: /s/ RONALD M. WHYTE

RONALD M. WHYTE

*United States District Judge
on Behalf of the Panel*

Copy of Order mailed on _____ to:

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Pacific Grove, CA 93950

APPENDIX 6

U.S. DEPARTMENT OF JUSTICE
CIVIL RIGHTS DIVISION
VOTING SECTION
P.O. BOX 66128
WASHINGTON, D.C. 20055-6188

March 6, 1995

Douglas C. Holland, Esq.
County Counsel
P.O. Box 1587
Salinas, California 93902-1587

Dear Mr. Holland:

This refers to the submissions to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, of the following voting changes for the municipal court of Monterey County, California:

1. the consolidation of the municipal and justice courts that existed on November 1, 1968, into a single municipal court with nine judgeships;
2. the establishment of a tenth municipal court judgeship;
3. the adoption of an interim election plan for a 1995 special election pursuant to which municipal court judges shall be elected from four election subdistricts (known as divisions) with Divisions 1, 2, and 3 each electing one judge and Division 4 electing seven judges;
4. the districting plan for the divisions (as adopted on December 20, 1994, and modified in the manner reflected in the February 21, 1995, correspondence from the county's demographer, Dr. Jeanne Gobalet);
5. the term of office of persons elected as municipal court judges pursuant to the interim election plan; and

6. the procedures for conducting a June 6, 1995, special primary and an August 1, 1995, special runoff election to elect one judge each in Divisions 1, 2, and 3, and four judges in Division 4 (superseding the procedures for conducting a single, "winner-take-all" election on June 6, 1995).

We received your submission of the municipal court consolidation, the interim election plan, the districting plan (as adopted on December 20, 1994), the term of office, and the procedures for conducting a June 6, 1995, single election on January 3, 1995; your submission of the procedures for conducting a June 6, 1995, special primary and an August 1, 1995, special runoff election on January 11, 1995; your submission of the revisions to the districting plan on February 23, 1995; and your submission of the additional judgeship on March 6, 1995. Supplemental information was received on January 6 and February 26, 1995.

The Attorney General does not interpose any objection to the municipal court consolidation, the interim election plan, the districting plan (as modified), the term of office, the procedures for conducting a June 6 special primary and an August 1 special runoff, and the additional judgeship. However, we note that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the changes. In addition, as authorized by Section 5, we reserve the right to reexamine these changes if additional information that would otherwise require an objection comes to our attention during the remainder of the sixty-day review period. See the Procedures for the Administration of Section 5 (29 C.F.R. 51.41 and 51.43).

With regard to the procedures for conducting a single June 6 special election, this change has been superseded and, accordingly, the Attorney General will make no determination with respect to this change.

Sincerely,

DEVAL L. PATRICK
Assistant Attorney General
Civil Rights Division

By: /s/ ELIZABETH JOHNSON

ELIZABETH JOHNSON
Acting Chief, Voting Section

cc: Joaquin G. Avila, Esq.

APPENDIX 7

NO. C-91-20559 RMW(EAI)
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

FILED SEPTEMBER 7, 1995
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE

VICKY M. LOPEZ ET AL.,
Plaintiffs, v.
MONTEREY COUNTY, CALIFORNIA,
Defendant.
STATE OF CALIFORNIA,
Intervenor-Defendant

ORDER RE BRIEFING FOR STATUS CONFERENCE

The parties are hereby requested to brief the effect of *Miller v. Johnson*, 95 Daily Journal D.A.R. 8495 on this case in their status conference statements for the status conference on September 28, 1995 at 1:30 p.m.

DATED: September 6, 1995

/s/ RONALD M. WHYTE
RONALD M. WHYTE
United States District Judge
On Behalf of the Panel

APPENDIX 8

Case No. C-91-20559

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA
BEFORE THE
HONORABLES RONALD M. WHYTE, JUDGE
THE HONORABLE MARY SCHROEDER, JUDGE
THE HONORABLE JAMES WARE, JUDGE
VICKY M. LOPEZ, CRESCENCIO PADILLA, WILLIAM A.
MELENDEZ, JESSE G. SANCHEZ, and DAVID SERENA,
Plaintiffs,

vs.

MONTEREY COUNTY, CALIFORNIA,
Defendant.

Thursday, September 28, 1955
San Jose, California

Reporter's Transcript of Proceedings

APPEARANCES

For the Plaintiffs Joaquin G. Avila, Attorney at Law
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Reported By Lee-Anne Shortridge
Certified Shorthand Reporter
#9595

Appearances Continued on Next Page
Computerized Transcription by StenoCat

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For the Intervenor State of California	Manuel M. Medeiros and Daniel G. Stone, Deputy Attorneys General 1300 I Street, Suite 1101 Sacramento, California 94244
For the Intervenor Judge Stephen A. Sillman	Nielsen, Merksamer, Parrinello, Mueller & Naylor Marguerite Mary Leoni, Attorney at Law 591 Redwood Highway, Suite 4000 Mill Valley, California 94941

Thursday, September 28, 1995

THE CLERK: Calling case C-91-20559, Vicky Lopez versus Monterey County, on for status conference.

MR. AVILA: Joaquin Avila for the Plaintiffs, and with me at counsel table is my law clerk, Linda Stone, and an attorney working out of my office helping me on this case, Linda Gonzales.

MR. HOLLAND: Douglas Holland appearing on behalf of Monterey County.

MR. MEDEIROS: Good afternoon, Your Honor. Manuel Medeiros, Deputy Attorney General, and Daniel Stone, Deputy Attorney General, appearing for the Attorney General.

MS. LEONI: Marquerite Mary Leoni from Nielsen, Merksamer, Parrinello, Mueller & Naylor, and I'm appear-

ing on behalf of Steven A. Sillman, the presiding judge of the Monterey County Municipal Court.

JUDGE WHYTE: Good afternoon everybody. Is it your understanding that no one from the Justice Department is going to appear?

MR. AVILA: Your Honor, I spoke to them at about 12:00, and they indicated that they were not going to be here. They might be submitting a letter to the Court which might request any kind of inquiries from the Court that they could respond to.

But as far as I know, they're not going to make an appearance today.

JUDGE WHYTE: And they've filed nothing?

MR. AVILA: I left my office at about 12:40, Your Honor, and there was nothing in my fax machine.

MS. LEONI: Your Honor, on that question, I'd like to offer that yesterday I had the same question. I asked my secretary to speak with the attorneys in the office here in San Jose and my secretary was informed that they had not filed a brief.

JUDGE WHYTE: Okay. Thank you for the report. I must say it seems, to me, very disappointing that we haven't heard from them.

* * *

MR. HOLLAND: We've tried to work with the statute. We've, in essence, been taking a passive role, a conservative role, in trying to proceed.

Due to the frustration that you see, we've got now the State of California suggesting that we're in a particular box, but we're stuck with the dilemma that we need to try and move ahead.

What the County is now proposing is in fact a more aggressive, more assertive, more proactive standard to try and resolve this issue.

We think that also involves some sort of judicial determination in regard to, first of all, the validity of any plan that the County may adopt. I'm not prepared to recommend we implement a plan, that the County implement a plan, simply because it may be precleared by the Department of Justice.

I think the *Miller* case does indicate that there would be folks that would have serious concerns about any plan that the County might devise, and we need to validate that plan before we attempt to implement.

JUDGE SCHROEDER: We don't have jurisdiction.

MR. HOLLAND: No, you do not, and I'm not proposing we submit it to this Court. This would be a separate action we would file subsequent to the adoption of the plan and the preclearance effort, that's correct.

JUDGE WHYTE: One reason I was kind of expecting and hoping the United States would be here is to get its view on what effect the *Miller* case has on what they will be doing as far as preclearance. One wonders, if you now submitted the ordinances that weren't precleared to the Department of Justice for preclearance, how they would approach that? Do you have any idea?

* * *

JUDGE WHYTE: Do you feel the *Miller versus Johnson* case raises some questions about the constitutionality of the plan that was approved as an interim emergency plan?

MR. HOLLAND: No, I do not, Your Honor.

JUDGE WHYTE: And the reason?

MR. HOLLAND: The reason is it was an interim remedy to deal with a specific situation. I will be the first one to admit the reasons for the rationale for the boundaries were in fact race generated. There's no question about it. That was the sole motivation. Nothing else went into those considerations. To the extent any other factor went in, it was entirely secondary. There's no question about that.

But I think that it was also necessary in order to resolve a particular problem that we were in at that time. We were looking at, quite frankly, again, looking at what the status quo ante is. Status quo ante is in a multi-district court system that would have had four minority, or four majority-minority districts in it, and this particular plan came up with a plan, or came up with a program, that was essentially, that had three majority-minority districts.

APPENDIX 9

Civil Action No. C-91-20559-RMW (EAI)

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

VICKY M. LOPEZ, CRESCENCIO PADILLA, WILLIAM A.
MELENDEZ, JESSE G. SANCHEZ and, DAVID SERENA
Plaintiffs,

v.

MONTEREY COUNTY, CALIFORNIA,
STATE OF CALIFORNIA,
Defendants,
STEPHEN A. SILLMAN,
Intervenor,

Voting Rights Action
Three Judge Court

Circuit Judge Mary M. Schroeder
District Judge James Ware
District Judge Ronald M. Whyte

**PLAINTIFFS' NOTICE REGARDING
CONTINUING DISTRICT COURT'S JURISDICTION**

Pls. Notice - C-91-20559 RMW (EAI)

As a result of discussions with the parties in this action, there has arisen a question as to whether this Court has any continuing jurisdiction to resolve any issues pending the appeal to the United States Supreme Court. The discussions occurred after Plaintiffs sought a stipulation to the filing of an amended complaint in this action to enforce Section 5 of the Voting Rights Act 42 U.S.C. § 1973 c. In order to address these questions, Plaintiffs are filing this memorandum.

Plaintiffs on November 30, 1995, filed a notice of appeal. Plaintiffs are appealing the interlocutory injunction filed by this Court on November 1, 1995. The appeal challenges only the implementation of a temporary court-ordered election plan for electing municipal court judges in the March 26, 1996, primary elections. The appeal does not challenge any aspects of the November 1, 1995, Order which are not related to the implementation of the temporary court-ordered election plan.¹ Thus, the District Court has continuing jurisdiction to address Plaintiffs' anticipated filing of the First Amended Complaint, any issues related to the merits of this action, as well as, deciding Plaintiffs' Motion for Award of Attorney's Fees and Related Non-Taxable Costs

¹There are only three questions listed in Appellants' Jurisdictional Statement: "1) Whether in an Action to Enforce Section 5 of the Voting Rights Act, a District Court can Order as a Temporary Court-Ordered Election an At-large Election System, Which has not Received Section 5 Preclearance . . . ; 2) Whether in an Action to Enforce Section 5 of the Voting Rights Act, a District Court can Order as a Temporary Court-Ordered Election Plan, an Election Plan . . . Which does not Comply with the Standards Applicable to Court-Ordered Election Plans; 3) Whether in an Action to Enforce Section 5 of the Voting Rights Act, There are Extreme Circumstances Justifying the Use of a Temporary Court-Ordered Election Plan . . . Which has not Received Section 5 Preclearance." Jurisdictional Statement at i (filed January 29, 1996).

which was filed on May 4, 1995, and heard on June 16, 1995.

Such continuing jurisdiction in the present action is supported by applicable precedent. In *Sycuan Band of Mission Indians v. Roache*, 788 F.Supp. 1498 (S.D.Cal. 1992), *affirmed*, 38 F.3d 402 (9 Cir.), a district court concluded that it had continuing jurisdiction to address other merit-related issues while a preliminary injunction was appealed:

"A well-recognized exception to this general rule of divestiture of jurisdiction is appeals from orders granting or denying jurisdiction pursuant to 28 U.S.C. Sec. 1292(a)(1). In an early case, the Ninth Circuit concluded an appeal from an interlocutory order does not divest the district court of jurisdiction to continue with other phases of the trial. *Phelan v. Taitano*, 233 F.2d 117 (9th Cir. 1956). Numerous other courts also have concluded an appeal of a preliminary injunction does not prevent the district court from proceeding with the action on the merits. *Shevlin v. Schewe*, 809 F.2d 447 (7th Cir. 1987); *United States v. City of Chicago*, 534 F.2d 708, 711 (7th Cir. 1976); *Thomas v. Board of Educ.*, 607 F.2d 1043, 1047 n. 7 (2d Cir. 1979); *Watkins v. United States Army*, 541 F.Supp. 249, 252 (W.D.Wa. 1982); *Robb Container Corp. v. Sho-Me Co.*, 566 F.Supp. 1143, 1157 (N.D.Ill. 1983); *United Parcel Svc. v. United States Postal Serv.*, 475 F.Supp. 1158 (E.D.Pa. 1979). . . ."

Id., 788 F.Supp. at 1511. See 9 Moore's Federal Practice ¶ 203.11 (Revision Sept. 1995)

("However if, an appeal is taken from a judgment which does not finally determine the entire action, the appeal does not prevent the district court from proceeding with matters

not involved in the appeal. Thus, the district court is not divested of jurisdiction to award costs as to matters which are not involved in the appeal, nor does an appeal from an order granting or denying a preliminary injunction divest the district court of jurisdiction to proceed with the action on the merits.") (footnotes omitted). *See also Taylor v. Sterrett*, 640 F.2d 663 (5th Cir. 1994) (pending appeal of interlocutory orders did not divest jurisdiction from the district court to decide motion for attorney's fees for other orders which were not the subject of the appeal). However, jurisdiction will be divested if the appeal raises issues which would affect the ability of the district court to adjudicate the merits. *See, e.g., Chuman v. Wright*, 960 F.2d 104 (9th Cir. 1992) (where appeal of an interlocutory qualified immunity issue divested jurisdiction from the district court, unless the court certified that the appeal was frivolous or was waived). The exception noted in *Chuman* is not applicable to the *Lopez* litigation. The resolution of the appeal in the *Lopez* will not affect the ability of this Court to adjudicate any pending motions or other merit-related issues anticipated to be raised by the Defendants or the Intervenor.

In conclusion, this Court has continuing jurisdiction to adjudicate the pending attorney's fees motion filed by the Plaintiffs, and other issues related to this Section 5 enforcement action.

Date: February 8, 1996

JOAQUIN G. AVILA
BARBARA Y. PHILLIPS

By: /s/ JOAQUIN G. AVILA
JOAQUIN G. AVILA
Attorney for Plaintiffs

Pls. Notice - C-91-20559 RMW (EAI)

CERTIFICATE OF SERVICE

I certify that a true and correct copy of Plaintiffs' Notice Regarding Continuing District Court's Jurisdiction was mailed on February 8, 1996, to the following counsel and addresses:

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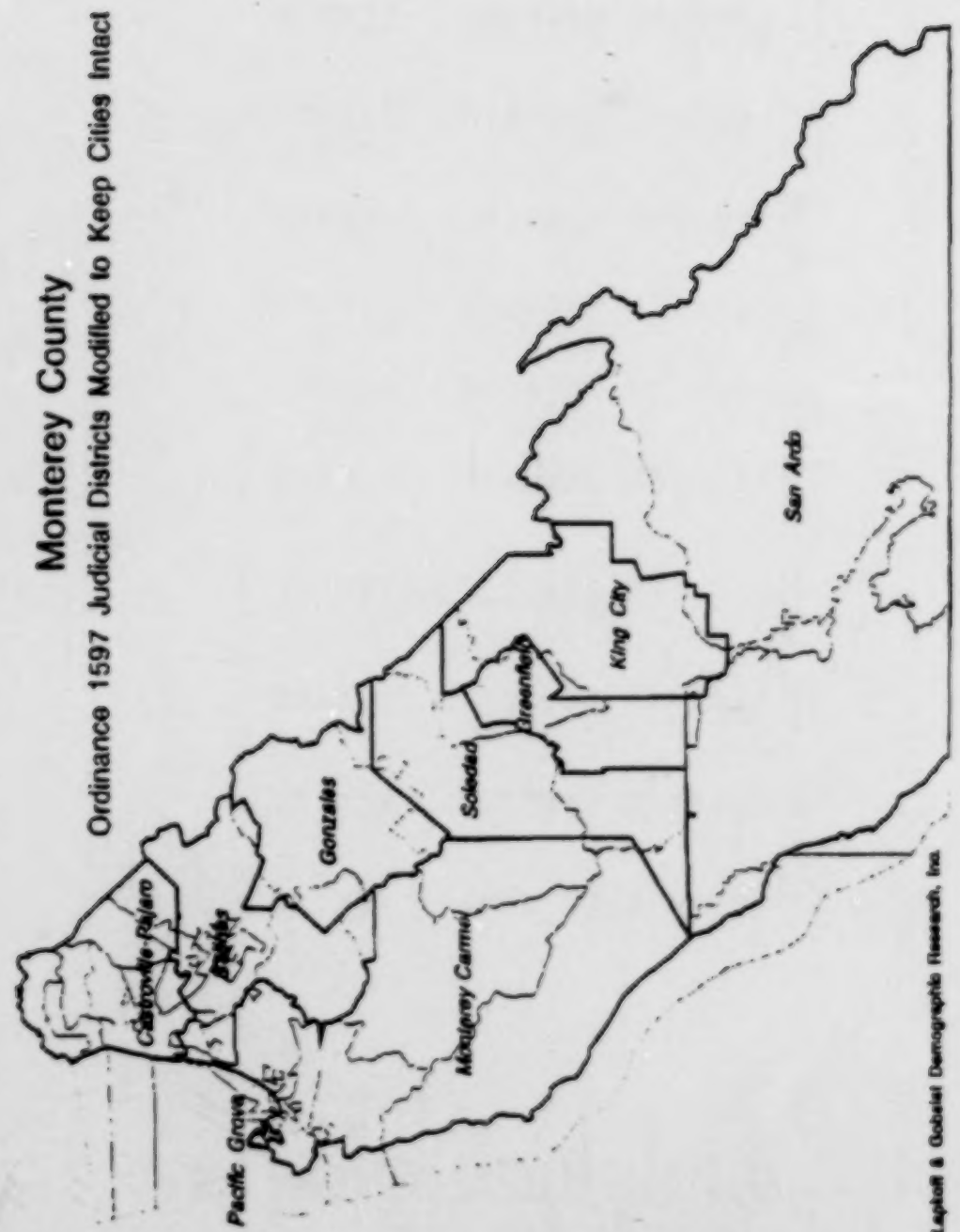
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APPENDIX 10



BEST AVAILABLE COPY

Estimate of Ordinance 1597 Judicial District Populations, Modified to keep Cities Intact
1990 U.S. Census Data

	Castroville- Pajaro	Goazales	Greenfield	King City	Monterey- Carmel	Pacific Grove	Salinas	San Ardo	Soledad		Total
									Including All	Excluding Prisons	
Total Population	39,878	7,880	8,987	10,842	105,730	16,131	146,858	3,891	15,461	9,465	355,660
Latino	41%	76%	74%	61%	9%	6%	40%	26%	63%	80%	33%
White (NH)	52%	18%	22%	36%	71%	87%	43%	87%	19%	14%	52%
API	5%	5%	2%	1%	8%	5%	10%	2%	2%	4%	8%
Black	1%	1%	1%	1%	11%	1%	6%	4%	14%	1%	6%
IEA (NH)	1%	0%	1%	0%	1%	1%	1%	1%	0%	0%	1%
Other (NH)	0%	0%	1%	0%	0%	0%	0%	0%	1%	0%	0%
Population 18+	27,472	4,960	5,577	7,123	83,431	13,287	100,988	2,798	12,072	6,076	257,709
Latino	36%	71%	71%	57%	8%	5%	35%	21%	56%	76%	28%
White (NH)	55%	21%	26%	40%	74%	88%	48%	71%	22%	18%	57%
API	6%	6%	2%	1%	8%	5%	11%	2%	2%	4%	8%
Black	1%	1%	1%	1%	10%	1%	6%	4%	18%	1%	6%
IEA (NH)	1%	0%	1%	0%	1%	1%	1%	1%	0%	0%	1%
Other (NH)	0%	0%	1%	0%	0%	0%	0%	0%	2%	0%	0%
Citizens 18+ (Estimated)											
Latino	23%	54%	51%	36%	6%	5%	23%	10%	39%	62%	17%
White (NH)	68%	37%	44%	60%	78%	90%	60%	81%	31%	31%	68%
API	6%	7%	3%	2%	5%	4%	9%	2%	2%	4%	7%
Black	2%	1%	1%	1%	10%	1%	7%	5%	26%	2%	8%
IEA (NH)	1%	1%	1%	1%	1%	1%	1%	2%	0%	1%	1%
Other (NH)	0%	0%	0%	0%	0%	0%	0%	0%	2%	0%	0%

Columns may not appear to total 100 percent because of rounding.

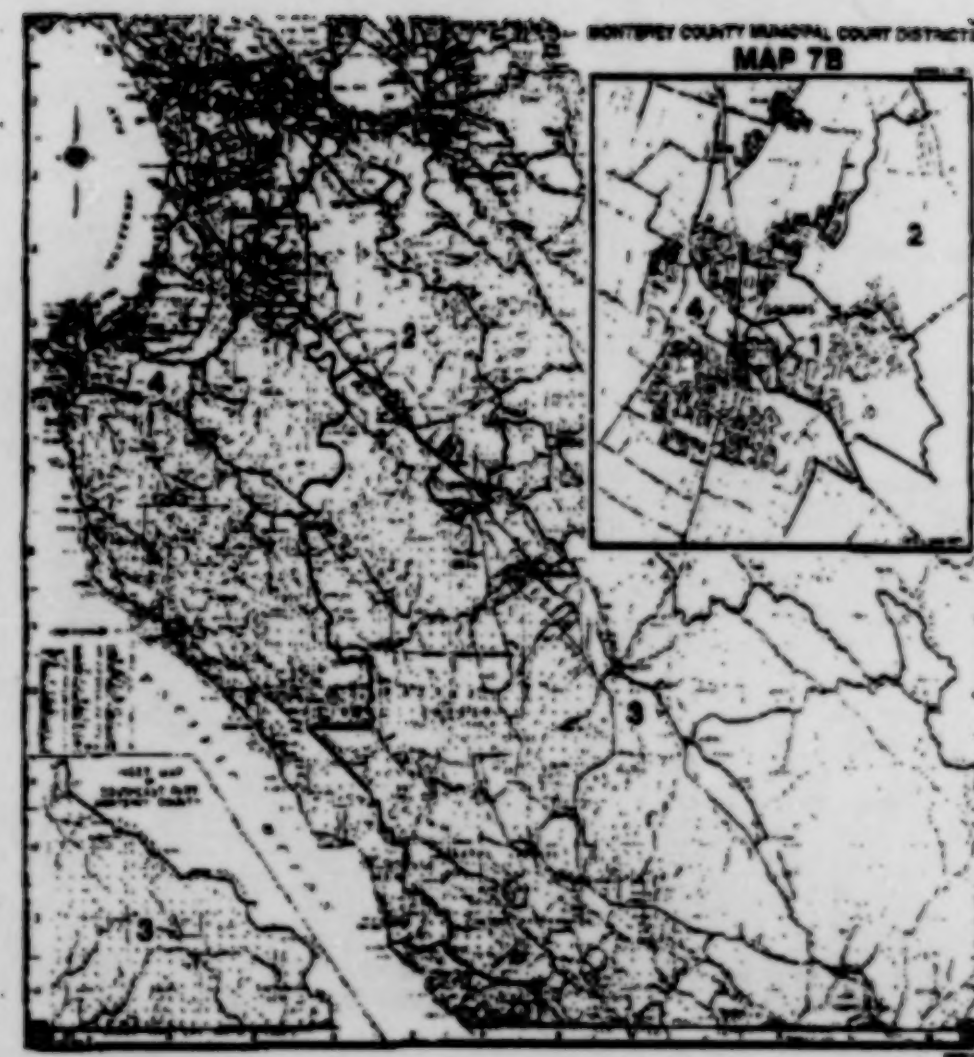
NH = Non-Hispanic

IEA = American Indian, Eskimo, or Aleut

API = Asian or Pacific Islander

Lapkoff Gobalet Demographic Research, Inc.

APPENDIX 11



Full size copy of map has been lodged with the Clerk of the Court.

**Monterey County Municipal Court Districts
Summary Table
Plan 7B**

	1	2	3	4	Total
			Including All	Excluding Prison	
Total Population	35,691	34,547	31,630	25,634	253,792
Latino	75%	74%	55%	59%	18%
White (NH)	17%	17%	35%	37%	64%
API	5%	7%	1%	2%	9%
Black	2%	2%	8%	1%	8%
IEA (NH)	1%	0%	1%	1%	1%
Other (NH)	0%	0%	1%	0%	0%
Population 18+	22,220	21,797	22,836	16,842	190,854
Latino	69%	69%	49%	54%	16%
White (NH)	22%	21%	37%	42%	68%
API	6%	7%	1%	2%	9%
Black	2%	2%	11%	2%	7%
IEA (NH)	1%	1%	1%	1%	1%
Other (NH)	0%	0%	1%	0%	0%
Citizens 18+ (Estimated)	12,950	12,649	16,049	11,313	170,088
Latino	52%	52%	30%	33%	11%
White (NH)	37%	35%	52%	61%	74%
API	7%	8%	1%	2%	7%
Black	3%	3%	14%	2%	8%
IEA (NH)	1%	1%	1%	1%	1%
Other (NH)	0%	0%	1%	0%	0%

NOTE: Latino percentages include Hispanic Blacks and Hispanic APIs. A district's Hispanic percentage may be one percentage point higher than a district's Latino percentage.

NH = Non-Hispanic

IEA = American Indian, Eskimo, or Aleut

API = Asian or Pacific Islander

Columns may not appear to total 100 percent because of rounding.

Largest District	36,256
Smallest District	31,630
Difference	4,626
Ideal District	35,566
Division	13.0%

Lapkoﬀ Gobalet Demographic Research, Inc.

Supreme Court, U.S.
FILED
FEB 28 1996
CLERK

In The
Supreme Court of the United States
October Term, 1995

VICKY M. LOPEZ, CRESCENCIO PADILLA,
WILLIAM A. MELENDEZ, and DAVID SERENA,

Appellants,

v.

MONTEREY COUNTY, CALIFORNIA,
STATE OF CALIFORNIA, *et al.*,

Appellees,

and

STEPHEN A. SILLMAN,

Intervenor-Appellee.

On Appeal From The United States District Court
For The Northern District Of California

MOTION TO DISMISS OR AFFIRM

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71 Pp

QUESTIONS PRESENTED

1. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION BY AMENDING ITS INTERLOCUTORY INJUNCTIVE ORDER TO DIRECT A COUNTY-WIDE ELECTION OF MUNICIPAL COURT JUDGES IN A SECTION 5 COVERED COUNTY, WHERE NO SECTION 5 VIOLATION HAS YET BEEN DETERMINED, WHERE PLAINTIFFS DELAYED 20 YEARS IN BRINGING THEIR ACTION TO CHALLENGE HISTORIC COUNTY ORDINANCES, WHERE A RETURN TO THE 1968 STATUS QUO WAS NO LONGER FEASIBLE, WHERE THE ORDINANCES WERE NOT SHOWN TO HAVE HAD EITHER DISCRIMINATORY PURPOSE OR DISCRIMINATORY EFFECT, WHERE THE ORDINANCES MAY HAVE BEEN SUPERSEDED BY INTERVENING STATE LAW, WHERE THE COURT'S COUNTY-WIDE ELECTION SCHEME CONFORMS TO STANDARD NEUTRAL STATE DISTRICTING PRINCIPLES, AND WHERE THE COURT'S PREVIOUSLY ORDERED ELECTION SCHEME WAS PATENTLY VIOLATIVE OF THE FEDERAL CONSTITUTION AND OF THE VOTING RIGHTS ACT IN LIGHT OF THIS COURT'S DECISION IN *MILLER v. JOHNSON*.
2. WHETHER THE DISTRICT COURT'S 1994 ONE-TIME EMERGENCY INTERIM ELECTION ORDER, WHICH WAS EXPRESSLY INTENDED TO HAVE NO SUBSEQUENT PRECEDENTIAL EFFECT AND WHICH EMPLOYED ELECTION SUB-DISTRICTS WHICH THE COURT HAD REJECTED WHEN PROFFERED AS A LEGISLATIVE PLAN, MUST BE VIEWED AS THE "BENCHMARK" BY WHICH SECTION 5 "RETROGRESSION" IS TO BE MEASURED, NOTWITHSTANDING THE FACT THAT THE ELECTION SCHEME VIOLATED THE STATE CONSTITUTION; THE ELECTION SUB-DISTRICTS WERE CONFIGURED EXCLUSIVELY ON THE

QUESTIONS PRESENTED – Continued

BASIS OF RACE; THE PLAN RESULTED IN A GRATUITOUS THREEFOLD EXPANSION OF LATINO VOTING STRENGTH OVER PREVIOUS LEVELS; AND THE PLAN WAS PATENTLY VIOLATIVE OF THE FEDERAL CONSTITUTION AND OF THE VOTING RIGHTS ACT IN LIGHT OF THIS COURT'S DECISION IN *MILLER v. JOHNSON*.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
STATEMENT OF FACTS	2
Appellants' "Statement of the Case"	2
Relevant Facts Relied Upon By Appellee on This Motion	6
ARGUMENT	14
I. This Appeal is From an Interlocutory Injunctive Order Issued Prior to a Final Determination Whether Section 5 Has Been Violated	14
II. Even if the Court's Injunction Could Accurately Be Described as a Refusal to Intervene, Such A Remedy Would Be Appropriate in the Extreme Circumstances Presented Here	17
A. The Absence of Ascertainable Harm	18
B. The Unique Combination of Circumstances Weighs Against Enjoining County-Wide Elections	21
III. Appellants' Proffered Remedial Authorities Are Inapposite	23
IV. In Any Event, The Interim Order Directing County-Wide Elections is Consistent With Section 5 Standards; And, The Court's Previous Race-Based Election Plan is Unconstitutional and is Not a Valid "Benchmark"	25
CONCLUSION	30

TABLE OF AUTHORITIES

	Page
CASES	
<i>Allen v. State Board of Elections</i> , 393 U.S. 544, 89 S.Ct. 817 (1969)	24
<i>Apache County v. United States</i> , 256 F.Supp. 903 (D.D.C. 1966)	17
<i>Beer v. United States</i> , 425 U.S. 130 (1976)	16
<i>Castro v. State of California</i> , 2 Cal.3d 223 (1970)	17
<i>Chisom v. Roemer</i> , 501 U.S. 380 (1991)	20
<i>Clark v. Roemer</i> , 500 U.S. 646 (1991)	17, 18
<i>Connor v. Finch</i> , 431 U.S. 407, 97 S.Ct. 1828 (1977)	29
<i>Connor v. Waller</i> , 421 U.S. 656, 95 S.Ct. 2003 (1973)	24
<i>County of Monterey v. United States of America</i> , No. 93-1639 (D.D.C., filed Aug. 10, 1993)	8
<i>Georgia v. United States</i> , 411 U.S. 526, 93 S.Ct. 1702 (1973)	24
<i>Holder v. Hall</i> , ___ U.S. ___, 114 S.Ct. 2581 (1994) ..4,	21
<i>Katzenbach v. Morgan</i> , 384 U.S. 641 (1966)	10, 19, 24
<i>Koski v. James</i> , 47 Cal.App.3d 349 (1975)	13
<i>League of United Latin American Citizens v. Clements</i> , 999 F.2d 831 (5th Cir. 1993) cert. denied, 114 S.Ct. 878 (1993)	21
<i>Lockhart v. United States</i> , 460 U.S. 125, 103 S.Ct. 998 (1983)	4

TABLE OF AUTHORITIES - Continued

	Page
<i>Lopez v. Hale County, Texas</i> , 797 F.Supp. 547 (N.D.Tex. 1992), aff'd., 113 S.Ct. 954 (1993)	21
<i>Lopez v. Monterey County</i> , 871 F.Supp. 1254 (N.D.Cal. 1995)	passim
<i>McDaniel v. Sanchez</i> , 452 U.S. 130 (1981)	27, 29
<i>Miller v. Johnson</i> , ___ U.S. ___, 115 S.Ct. 2475 (1995)	passim
<i>N.A.A.C.P. v. Hampton County Election Com'n</i> , 470 U.S. 166, 105 S.Ct. 1128 (1985)	24
<i>Nipper v. Smith</i> , 39 F.3d 1494 (11th Cir. 1994) cert. denied, 115 S.Ct. 1795 (1995)	21
<i>Oregon v. Mitchell</i> , 400 U.S. 112 (1970)	19
<i>Perkins v. Matthews</i> , 400 U.S. 379, 91 S.Ct. 431 (1971)	4, 24
<i>Republican Party of North Carolina v. Hunt</i> , 991 F.2d 1202 (4th Cir. 1993)	21
<i>Richter v. Board of Supervisors</i> , 259 Cal.App.2d 99 (1968)	26
<i>South Carolina v. Katzenbach</i> , 383 U.S. 301 (1966)	16, 19, 24
<i>State of Mississippi v. Smith</i> , 541 F.Supp. 1329 (D.D.C. 1982) appeal dismissed 461 U.S. 912 (1983)	27, 28
<i>State of Mississippi v. United States</i> , 490 F.Supp. 569 (D.D.C. 1979) sum. aff'd., 444 U.S. 1050 (1980) ..	27, 28
<i>State of Texas v. United States</i> , 785 F.Supp. 201 (D.D.C. 1992)	27

TABLE OF AUTHORITIES - Continued

	Page
<i>U.S. v. Board of Supervisors</i> , 429 U.S. 642, 97 S.Ct. 833 (1977).....	24
<i>Wells v. Edwards</i> , 347 F.Supp. 453 (M.D.La. 1972) <i>aff'd</i> , 409 U.S. 1095 (1973).....	19, 20
CONSTITUTIONAL PROVISIONS	
United States Constitution	
Tenth Amendment	15, 21
Fourteenth Amendment	18, 20, 21, 28
Fifteenth Amendment	15, 18, 20
California Constitution	
Article VI, section 5	7, 11
Article VI, section 16(b)	5, 12, 13, 22
STATUTES	
California Government Code	
§ 23002.....	26
§ 23012.....	26
§ 73560.....	7, 14, 27
California Stats. 1989	
chapter 608	7
Federal Voting Rights Act (42 U.S.C. §§ 1971 et seq.)	
§ 2.....	<i>passim</i>
§ 5.....	<i>passim</i>

TABLE OF AUTHORITIES - Continued

	Page
REGULATIONS	
28 United States Code of Federal Regulations	
§ 51.54(b)	26, 29, 30
OTHER AUTHORITIES	
68 Ops.Cal.Atty.Gen. 175 (1985).....	26
California Proposition 191.....	7
Monterey County Ordinance No. 2930.....	14

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 18.6, Appellee State of California respectfully moves to dismiss the appeal or, alternatively, to affirm the interim remedial election order sought to be reviewed, on the ground that the questions on which this Court's decision depends are not sufficiently substantial to require further argument. The injunctive order below is interlocutory in nature and was issued in conjunction with the district court's order reopening the threshold question herein: namely, whether plaintiffs can establish even a technical violation of Section 5 of the Voting Rights Act (42 U.S.C. § 1973c) in this proceeding. Thus, at this point, the court below has not reviewed all the relevant facts, and there is no final determination that Monterey County's conducting of the challenged judicial elections would violate Section 5 at all.

Further, while Section 5 actions are normally brought in an effort to preserve the election status which existed before the filing of the complaint, plaintiffs here – who waited 20 years before insisting upon preclearance – attempt to use their complaint as a lever to effect radical changes in those voting procedures. They *attack* the status quo as it existed before their action was filed, and they oppose any return to the status which existed in 1968, prior to enactment of the historical county ordinances which are the focus of their complaint. Instead, with the apparent complicity of the United States Department of Justice¹ and without having established either

¹ The United States Department of Justice ("DOJ") has played a rather enigmatic and troubling role in these proceedings. Plaintiffs and the County are apparently convinced that DOJ will refuse to preclear any election plan for municipal court judges unless such plan calls for suspension of California's constitutional districting requirements. (See *Lopez v. Monterey County*, 871 F.Supp. 1254, 1257 (N.D.Cal. 1994); and see Parties' 2d. Stipulation at ¶ 5. (Apx. 3a-4a) Yet DOJ has endorsed and precleared a proffered 1994 race-based plan (see Juris. Stmt., App. 53-55) – just as it did in *Miller v. Johnson*, ___ U.S. ___, 115 S. Ct. 2475, 2493 (1995) – despite the absence of any evidence or findings to justify such a discriminatory approach. And, in suggesting to this Court that a "hearing"

constitutional violations or "retrogression," they have urged the district court to impose "remedial" election plans which are extremely discriminatory in favor of Latinos and against others.

Under the extraordinary circumstances presented in this case, the district court's interlocutory order is consistent with legal precedents established by this Court and presents no conflict requiring this Court's resolution.

STATEMENT OF FACTS

Appellants' "Statement of the Case"

The "Statement of the Case" set forth in Appellants' jurisdictional statement is neither accurate nor complete, and includes a number of assertions which have no bearing on or relevance to this proceeding. Accordingly, their recitation of facts must be corrected.

Although this action, initially filed in September 1991, was brought under the Voting Rights Act, it was filed only as a *Section 5* action, with Monterey County the only named defendant. There was no allegation that the defendant had violated Section 2 of the Act. Rather, plaintiffs alleged only that defendant Monterey County had committed a technical violation of Section 5 by neglecting to obtain "preclearance" before implementing a series of historic county ordinances – promulgated *between 1972 and 1983* – which allegedly had the effect of consolidating a number of different-sized municipal court and justice court districts, some of them extremely small rural districts, into a single county-wide municipal court district.

should be held to determine whether that 1994 plan comported with normal districting principles, DOJ ignores the undisputed fact that the 1994 plan directly violated two districting requirements of the California Constitution (Juris. Stmt., App 7; *Lopez*, 871 F.Supp. at 1258-1260) and further disregards the County's *admission*, made at the September 28, 1995 hearing, that the plan's electoral sub-districts were configured exclusively on the basis of race. (See fn. 6, *infra*.)

Appellants omit mention of the fact that these plaintiffs waited *nearly 20 years* before challenging the County's 1972 ordinance, or that they waited *fully 8 years* before questioning the validity of the 1983 ordinance. *See Lopez v. Monterey County*, 871 F.Supp. 1254, 1256 (N.D.Cal. 1994). Those ordinances were operational long before this action was brought. Also absent from Appellants' statement is the fact that a number of *state* laws were enacted and *state* constitutional provisions adopted after promulgation of the challenged ordinances – including a statute defining the Monterey County Municipal Court as a single county-wide district and a constitutional provision eliminating justice courts in the State of California – and that these intervening state measures arguably superseded the County's historical ordinances respecting justice court and municipal court districts.²

Similarly, Appellants are inaccurate when they assert that the district court has already determined that Section 5 of the Act was violated in this case. To be sure, the court has determined that Monterey County is a covered jurisdiction, and that the County failed to obtain federal preclearance before implementing the historic series of "consolidation ordinances" which is the focus of Appellants' action. But that is not the end of the inquiry. The question whether municipal court elections were conducted in violation of Section 5, at the time the complaint was filed, has *not* yet been finally determined in the court below. The district court, in the selfsame November 1, 1995 order which is the subject of this appeal, also ordered that the State of California be joined as a party defendant and be permitted to raise defenses which have not yet been litigated and which may result in outright dismissal of Appellants' cause of action. *See Juris. Stmt.*, App. 7-8. Such defenses might include, for example, the defense of laches; or the claim that county municipal court elections are

² The district court has not yet addressed the effect of these intervening state measures; neither has the district court yet addressed the effect of appellants' inordinate and unexplained delay in bringing their Section 5 action against the County.

conducted, not according to historical county ordinances, but pursuant to superseding state statutes and constitutional provisions which are not subject to preclearance; or even a challenge to the initial designation of Monterey County as a covered jurisdiction under Section 5. Thus, the question whether Section 5 has been violated here, and, indeed, whether Section 5 even has any application to the subject elections, remains to be litigated in the district court.

In addition, Appellants' "Statement of the Case" includes improper allegations of past "discrimination" against Latinos in Monterey County, of geographically concentrated populations, and of alleged historic "Anglo bloc voting." Juris. Stmt., pp. 3-6. The district court has made no findings as to any of these claims, and – because Appellants have not alleged any Section 2 violation(s) – any attempt by plaintiffs to establish such facts in this context would be futile.³ Their unproven assertions in this respect are without relevance to this Section 5 claim. Furthermore, Appellants omit mention of their stipulation that, with respect to promulgation of the historical series of ordinances challenged here, they have *no evidence* that county authorities were motivated by unlawful purpose. See Parties' 2d. Stipulation at ¶ 3 (Apx. 2a)⁴

³ See, e.g., *Holder v. Hall*, ___ U.S. ___, 114 S.Ct. 2581, 2587 (1994) [mere fact that voting change must be precleared does not make the practice subject to Section 2 vote dilution challenge]; and see *Miller v. Johnson*, ___ U.S. ___, 115 S. Ct. 2475, 2491 (1995) [mere assertions or stipulations that remedy is required are insufficient to justify racially based remedy].

⁴ In the context of Section 5 preclearance, the only relevant question is whether an enactment, assuming that it constitutes a change with respect to voting (cf. fn. 23, *infra*), is "retrogressive" when compared to the previous electoral system. See *Holder v. Hall*, *supra*, 114 S.Ct. at 2587, and see *Lockhart v. United States*, 460 U.S. 125, 129 n.3, 103 S.Ct. 998, 1001 n. 3 (1983). And this determination can be made only by the District Court for the District of Columbia. *Perkins v. Matthews*, 400 U.S. 379, 385, 91 S.Ct. 431, 435 (1971). Contrary to appellants' suggestions, no such determination of retrogression has ever been made as to the historical county ordinances at issue here. Furthermore, because the County's various

Appellants also mischaracterize the district court's November 1995 order as a "refusal to enjoin an unprecleared legislative scheme." In fact, the court below has consistently enjoined the County from proceeding according to unprecleared ordinances or programs, and the court's November 1 order is a continuation of that injunction. The election directed therein was ordered, expressly, "[p]ursuant to [the court's] equitable power to effect a remedy." (Juris. Stmt., App. 8.) The court's order of a one-time county-wide election was consistent with the State's standard neutral districting principles (see Cal. Const., art. VI, § 16(b)), and came after careful analysis by the court of possible alternative steps. The order issued in a case where the plaintiffs argued that a return to the 1968 status quo was neither feasible nor desirable, where the plaintiffs conceded that the County's historic consolidation ordinances reflected no discriminatory purpose, where the County failed to present an acceptable, precleared alternative plan, where retrogression was neither determined nor determinable (Juris. Stmt., App. 7), and where the court's previous interim election order was unconstitutional in light of this Court's intervening analysis in *Miller v. Johnson*, ___ U.S. ___, 115 S. Ct. 2475, 2493 (1995).⁵

Finally, Appellants' Statement of the Case omits the indisputable and dramatic discriminatory impact of the race-based election plan which Appellants advocate and which was briefly imposed, for a one-time emergency interim election with shortened terms, by the district court in December 1994.

judicial districts in 1968 had enormous disparities in population, and because judges elected in 1968 sat as judges only in the discrete districts in which they were elected, any fair consideration of "retrogression" – if it were to avoid meaningless comparisons of "apples to oranges" or, here, "grapes to watermelons" – would require complex and careful statistical analyses. (See Apx. 20a-21a at fn3.)

⁵ Indeed, the possibility of a county-wide election was presaged in the court's December 1994 order, wherein the court observed that "ultimately an at-large system . . . may prove, under the totality of circumstances, to be the best judicial election system." *Lopez*, 871 F.Supp. 1254, at 1259.

The County has conceded that this plan, which violated two provisions of the California Constitution, was fashioned *exclusively* on the basis of race, a fact which Appellants neglect to mention.⁶ And the plan, unsupported by any judicial determinations of discrimination or "retrogression," resulted in a nearly threefold expansion of Latino voting strength in municipal court elections, with a corresponding diminution of non-Latino voting strength in the County. (See Apx. 14a-15a, 20a-21a at fn. 3; and see Argument IV, *infra*) Under this Court's decision in *Miller*, that race-based plan is patently violative of the Fourteenth Amendment as well as the Voting Rights Act, notwithstanding the fact that DOJ, as it did in *Miller*, willingly affixed its "preclearance" imprimatur to the discriminatory scheme. The relief which Appellants seek through this appeal would result in prolonging the effect of that radically discriminatory plan, contrary to this Court's holding in *Miller* and contrary to the express wishes of the district court which imposed it in the first place.

Relevant Facts Relied Upon By Appellee on This Motion⁷

As noted above, Appellants' Section 5 action, though it challenges a series of ordinances adopted by Monterey County in the period between 1972 and 1983, was not filed in the United States District Court for the Northern District of

⁶ As Monterey County Counsel Doug Holland admitted during the September 28, 1995 status conference:

I will be the first one to admit *the reasons for [-] the rationale for [-] the boundaries were in fact race generated. There's no question about it. That was the sole motivation. Nothing else went into those considerations.* To the extent any other factor went in, it was entirely secondary. There's no question about that.

(Apx. 13a; emphasis added.)

⁷ Appellee's relevant facts, insofar as they include events preceding December 1994, are derived chiefly from the district court's decision in *Lopez*, 871 F.Supp. at 1256-1257.

California until many years thereafter, on September 6, 1991.⁸ Concurrently with and subsequent to promulgation of these local ordinances, various state measures were adopted which affected judicial elections in the County. For example, in 1979 the Legislature *repealed* the former article relating to municipal courts in Monterey County and declared the existence of a new municipal district.⁹ That state statute was then amended, in 1989 (Cal. Stats. 1989, ch. 608), to redefine the Monterey County Municipal Court District as a single district encompassing the entire county. (Cal. Gov. Code § 73560.) And, in November 1994, the People of California adopted Proposition 191, thereby altogether eliminating justice courts throughout the State. See Cal. Const., art. VI, § 5. (There were seven such justice court districts in Monterey County in 1968. *Lopez*, 871 F.Supp. at 1256.)

⁸ The State of California, which had initially intervened in this case to assert and protect state interests in the remedial phase (*Lopez*, 871 F.Supp. at 1256), was added as a party defendant by order of the district court on November 1, 1995. See Juris. Stmt., App. 8. In its recent answer to Appellants' complaint, the State has raised, *inter alia*, the defense of laches. (Apx. 28a) The district court has not heretofore considered this issue, which was not raised by defendant Monterey County in the earlier litigation of this case. Now that the liability question has been reopened by the court to include the State as defendant, however, the district court will have the opportunity to address the effect of plaintiffs' significant delay in bringing their action. The court will also have the opportunity to consider the State's mootness defenses, which are based upon (1) superseding state statutes and constitutional provisions, and (2) the apparent preclearance of the challenged county ordinances by the U.S. Attorney General on March 6, 1995. See State's Answer (Apx. 28a-29a); and see Juris. Stmt., App. 53-55. See also Apx. 16a-22a (State's Sept. 29, 1995 supplemental letter to district court).

⁹ "There is in the County of Monterey, on and after the effective date of this section, a single municipal court district which embraces the former Salinas Judicial District, Monterey Peninsula Judicial District and North Monterey County Judicial District. This article applies to the municipal court established within the judicial district which shall be known as the Monterey County Municipal Court." (Cal. Stats. 1979, ch. 694, § 1.)

On March 31, 1993, the district court found that the challenged historical county ordinances required preclearance but had not been precleared. The court held that those county ordinances "could not be implemented" in the absence of preclearance.

Monterey County then filed a declaratory judgment action in the United States District Court for the District of Columbia, seeking to have the challenged ordinances precleared after the fact. *County of Monterey v. United States of America*, No. 93-1639 (D.D.C., filed Aug. 10, 1993). However, that court made no findings and issued no judgment as to the propriety of preclearance or the related issue of "retrogression"; rather, the County abandoned its preclearance effort, voluntarily dismissing its action through a stipulation with the Appellants herein, which stipulation included the following provision:

The Board of Supervisors is unable to establish that the Municipal Court Consolidation Ordinances adopted by the County between 1968 and 1983 did not have the effect of denying the right to vote to Latinos in Monterey County due to the retrogressive effect several of these ordinances had on Latino voting strength in Monterey County.

Lopez, 871 F.Supp. at 1256.

Thereafter, the County and Appellants twice submitted stipulations, with proposed election plans and proposed orders, to the court below, asking the court to authorize these plans notwithstanding the fact that the election areas and methodologies devised therein conflicted with controlling provisions of the California Constitution. The State of California intervened in the action and objected to issuance of an order approving the plans.

On December 22, 1993, the district court rejected the first proposed election plan because the parties to the stipulation had failed to establish a need to suspend the California Constitution. On February 28, 1994, the court likewise refused, for the same reasons, to approve the second proposed election plan, which the County now concedes was designed solely for race-based purposes – i.e., to bolster Latino voting

strength in elections for municipal court judges.¹⁰ The County was ordered to devise and to submit for preclearance an election plan that complied both with the Voting Rights Act and with all applicable provisions of state law.

In the aforementioned stipulations, Appellants conceded that, as far as they were aware, county authorities had no discriminatory motive or purpose in adopting the historic county ordinances which are challenged in this action:

Plaintiffs acknowledge that as of the date of this Stipulation they had not discovered any evidence that Monterey County's adoption of the municipal court judicial district consolidation ordinances had the purpose or the intent of denying or abridging the right to vote within the meaning of Section 5 of the Voting Rights Act.

Apx. 2a, at ¶ 3.¹¹

On June 1, 1994, the court enjoined Monterey County from holding municipal court elections pending adoption and preclearance of an appropriate plan.

The County continued to fail to obtain preclearance of any election plan or to implement a precleared plan. The district court became concerned with the prolonged period in which voters had been deprived of their right to elect judges by virtue of the County's lack of success, and ultimately determined " . . . that [the court's] remedy must allow for an election pending implementation of a permanent legislative solution." *Lopez*, 871 F.Supp. at 1258. However, the court emphasized that this was merely a one-time, interim measure which in no way reduced the County's burden to devise, with plaintiffs, a satisfactory permanent legislative solution:

The interim election plan shall call for a special election in 1995 that is not unduly intrusive on state

¹⁰ See fn. 6, *ante*.

¹¹ See also the court's November 1, 1995 order (Juris. Stmt., App. 3). ("Further, neither the plaintiffs nor the County suggest that there is any evidence of purposeful discrimination in the enacting of the consolidation ordinances.")

law and policies and not unreasonably disruptive to the County's interests in effective and efficient delivery of municipal court services. Under the Supremacy Clause, the implementation of relief for a violation of the Voting Rights Act must take precedence over enforcement of state law that stands in the way of effective relief. *See Katzenbach v. Morgan*, 384 U.S. 641, 646-47 (1966). The terms of those elected, however, will expire on the first Monday in January 1997, so that the County understands that it must have a permanent solution in effect by the time of the next general election or it will risk being without judges.

Ibid.; emphasis added.

At the same time, the court expressly agreed with the State "... that any attempt to give the County approval to violate existing state law on a permanent basis is, at this time, beyond the scope of this court's function." *Id.* at n. 5. The court further acknowledged that, notwithstanding its one-time emergency election order, "ultimately an at-large system... may prove, under the totality of circumstances, to be the best judicial election scheme." *Id.* at 1259. And, finally, with the exception of this single court-ordered emergency interim election,¹² the court renewed its injunction prohibiting the County "from holding elections for municipal court judges pending adoption and preclearance of a permanent plan or further order of this court." *Id.* at 1261.¹³

¹² As the district court took pains to make clear, the one-time election which it ordered "is not being implemented as a legislative solution to the existing Voting Rights Act problem facing the County, but is rather being implemented by the court as an interim, emergency solution to insure the voters' right to elect municipal court judges." *Lopez*, 871 F.Supp. at 1259, n.7; emphasis added.

¹³ In an April 13, 1995 order, the court re-emphasized that the court-ordered election was intended only as a one-time emergency measure of very limited duration. There, the court granted the motion to intervene filed by Judge Sillman, Presiding Judge of the municipal court; however, the

The court's December 1994 order overrode contrary provisions in the California Constitution and required that an emergency election be conducted using what are, indisputably, race-based electoral districts. Thus, the court ordered a special election of municipal court judges in 1995 based on "the election plan set forth in the Second Stipulation presented to the court by Plaintiffs and the County on January 13, 1994" (*Lopez*, 871 F.Supp. at 1261), notwithstanding that this proposed "Municipal Court Division Plan" utilized election "sub-districts"¹⁴ the boundaries of which were unabashedly crafted specifically to increase Latino voting strength,¹⁵ and notwithstanding that the proposed Plan clearly conflicted with state districting policy in two respects: (a) it "included districts that split the City of Salinas" (*Id.* at 1258), in contravention of Article VI, Section 5 of the California Constitution; and (b) under the Plan, "a judge's jurisdictional

court denied Judge Sillman's request to modify its election order by extending judicial terms:

The court has considered the concerns raised by the County and Judge Sillman about the cost of conducting back-to-back elections in 1995 and 1996, the interference with judicial administration that could result therefrom, and the impracticability of the parties' reaching a permanent solution before 1996. On the other hand, the court is reluctant and unwilling at this time to establish six-year terms under an election plan that is designed to be an emergency, temporary solution to a problem most appropriately addressed through legislative action.

Apx. 7a-8a; emphasis added.

¹⁴ Under the court's December 1994 order, the municipal court remained a single county-wide district for jurisdictional and administrative purposes, with judges thereof sitting over the entire county. However, that district was divided into four discrete race-based electoral sub-districts, for election purposes, with no requirement that judicial candidates reside in the sub-district in which they stood for election. *See Lopez*, 871 F.Supp. at 1255-1256; and see Parties' 2d. Stipulation, ¶¶ 4, 5, Apx. 3a-4a.

¹⁵ See fn. 6, *ante*.

and electoral bases would not be coterminous," in contravention of Article VI, Section 16(b). *Ibid.*

On June 29, 1995, this Court filed its decision in *Miller*, 115 S. Ct. 2475. Prior to a scheduled September 28, 1995 status conference, the district court directed all parties to address, in their status conference statements, the impact of *Miller* upon the instant case. (Apx. 10a.) The parties did so, and, as noted above, it was during the September status conference that Doug Holland, Monterey County Counsel, pointedly admitted that the election areas proposed by the County in its Second Stipulation, and employed by the district court in its December 1994 emergency one-time election order, were entirely race-generated. (See fn. 6, ante)

On November 1, 1995, the district court issued its interlocutory Order Modifying Injunction – the subject of this appeal. Juris. Stmt., App. 1-9. There, the court observed that the validity of its previous emergency election order was at best questionable in light of this Court's decision in *Miller*: "The Supreme Court in *Miller v. Johnson*, 115 S.Ct. 2475 (1995), has cast substantial doubt upon the constitutionality of extending the duration of the previously ordered emergency, interim plan, as that plan used race as a significant factor in dividing the County into election areas." Juris. Stmt., App. 3.

Noting that "*Miller* raises substantial doubt as to whether legislative division into race based districts or election areas can ever withstand constitutional scrutiny" (Juris. Stmt., App. 3), the court concluded "that it should allow a county-wide election of municipal court judges in 1996 but enjoin elections thereafter pending preclearance of a permanent plan that complies with the Voting Rights Act and state law." *Ibid.*¹⁶ The court issued this modified injunction "[p]ursuant to its equitable power to effect a remedy," in light of the fact that a

¹⁶ In issuing this interim remedy, the district court also placed reliance upon the fact that "this litigation is not a Section 2 proceeding" (Juris. Stmt., App. 3, 7), and that there are no judicial findings that a county-wide election would have any discriminatory or retrogressive effect.

return to the status quo was not feasible. Juris. Stmt., App. 8.¹⁷ The remedy fashioned by the court was consistent with normal districting principles and with other municipal court elections conducted in non-covered jurisdictions within the State. See Cal. Const., art. VI, § 16(b); *Koski v. James*, 47 Cal.App.3d 349, 354 (1975).

Also, in this same November 1, 1995 order, the district court joined the State of California as an indispensable party defendant, and reopened the threshold issues of Section 5 liability in the case. The court expressly invited the State to seek dismissal of the action on grounds not heretofore considered:

The court also reconsiders its prior decision that the State should not be joined as an indispensable party. Since the State now argues that "in conducting municipal court elections, the County is not 'administering' its consolidation ordinances at all, but is instead 'administering' a state statute that defines the municipal court district to encompass the entire county," (State's Status Conference Memorandum, page 2, lines 12-14), the State clearly must be brought into this action in order to bring about a complete resolution of the issues. If the State believes that the County is only administering a State statute and that the failure to preclear the consolidation ordinances is of no significance, it can seek to lift the injunction and have this Section 5 litigation dismissed.

Juris. Stmt., App. 8; emphasis in original.¹⁸

¹⁷ The court's previous order had included the observation that county-wide elections might well be "the best judicial election system." *Lopez*, 871 F.Supp. at 1259. At that point, in 1994, the court declined to address the question, hoping that the County would formulate and preclear its own appropriate legislative solution. By November 1995, however, in the absence of a legislative solution and in light of *Miller*, the court felt impelled to craft a new injunctive order providing for an interim election.

¹⁸ It is certainly questionable whether, after 1989, the County can be said to be "administering" its consolidation ordinances at all in the conduct

ARGUMENT

I. This Appeal is From an Interlocutory Injunctive Order Issued Prior to a Final Determination Whether Section 5 Has Been Violated

Initially, the State submits that the questions presented by this appeal are not substantial by virtue of the procedural posture in which Appellants appear. The appeal is taken at a very preliminary stage of the case, from an *interlocutory injunctive order* – not, as Appellants argue, from a court's "refusal" to provide injunctive relief. And, the principal issues in the case have not yet been determined in the district court, including, for example, whether plaintiffs' action is foreclosed by laches, and/or whether the action is rendered moot by superseding state law.¹⁹ Thus, it has not yet been

of municipal court elections. In 1989 – six years *after* adoption of the most recent challenged county ordinance (Ordinance No. 2930) and two years before initiation of the instant proceeding – the California Legislature amended Cal. Gov. Code § 73560 to declare that the Monterey County Municipal Court District "encompasses the entire County of Monterey." (Cal. Stats. 1989, ch. 608.) Hence, it can reasonably be argued that, at this late date, the County is "administering" the *state statute* in the conduct of its elections, not the earlier, superseded, county consolidation ordinances. The issue whether the State, which is not a section 5 covered jurisdiction, was required to preclear the 1989 statutory amendment has not been adjudicated.

¹⁹ The State has also raised the question whether this action is further rendered moot by the U.S. Attorney General's determination not to interpose any objection to the County's consolidation ordinances. In a March 6, 1995 letter to Monterey County Counsel, DOJ notes that, among the "voting changes for the municipal court of Monterey County, California" which were submitted to the Attorney General for preclearance – indeed, the first such submission listed – was: "1. the consolidation of the municipal and justice courts that existed on November 1, 1968, into a single municipal court with nine judgeships." That letter then expressly states that "[t]he Attorney General does not interpose any objection to the *municipal court consolidation*, the interim election plan, the districting plan (as modified), the term of office, the procedures for conducting a June 6 special primary and an August 1 special runoff, and the additional

determined whether Section 5 of the Voting Rights Act has any application whatsoever to elections for municipal court judges in Monterey County as administered under current state law and state constitutional provisions. This fact alone shows the appeal to be without substance. Appellants' action may ultimately be dismissed below, without any legal basis whatsoever for permanent injunctive relief.²⁰

Furthermore, no court has yet considered the constitutional propriety of Monterey County's initial designation as a covered jurisdiction under Section 5. In *Miller*, this Court suggested that, absent strong evidence of discrimination, Congress' application of Section 5 restrictions and preclearance requirements to political subdivisions may well exceed Congress' power under § 2 of the Fifteenth Amendment and tread impermissibly upon the powers reserved to the States under the *Tenth Amendment*. Thus, the Court noted that Section 5 "was directed at preventing a particular set of invidious

judgeship." *See* Juris. Stmt., App. 54; emphasis added. Despite the letter's rather straightforward language, appellants characterize this preclearance as "ambiguous," and, citing a subsequent letter from DOJ on November 13, 1995, they argue that the express preclearance of the consolidation ordinances was not intended and should be disregarded. Juris. Stmt. at pp. 12-13, 15-17; and App. 28-84.

The district court has not ruled on the effect of the March 6, 1995 preclearance letter, and the court made it expressly clear that it placed no reliance on that letter in issuing its November 1, 1995 interim election order. (*See* Juris. Stmt., App. 25.) Manifestly, such preclearance would serve to moot the need for further injunctive relief in appellants' Section 5 action, and would support the propriety of a county-wide election for municipal court judges. (*See* State's Answer to Complaint, Apx. 28a-29a.)

²⁰ As an independent ground for affirmance, Appellee submits that, under these circumstances, where no Section 5 violation has been found, it would arguably have been an abuse of discretion if the district court *had* prevented county-wide elections from going forward in 1996. *See Miller*, 115 S.Ct. at 2488 (federal courts' disruption of election schemes is a "serious intrusion onto the most vital of local functions"). Indeed, having reopened the liability issue, the court should have lifted its injunction altogether until a Section 5 violation, if any, is proven by the plaintiffs.

practices which had the effect of 'undoing or defeating the rights recently won by nonwhite voters.' " (*Ibid.*) The statute "was a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down." (*Ibid.*, quoting from *Beer v. United States*, 425 U.S. 130, 140 (1976).) The Court observed that, notwithstanding the Tenth Amendment, "[i]n *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), we upheld § 5 as a necessary and constitutional response to some states' 'extraordinary stratagems of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees.' " (*See Miller*, 115 S.Ct. at 2493.) In its very next sentence, however, the Court indicated that the interests of *federalism* necessarily limit the extent to which Section 5 preclearance requirements may be justified:

"But our belief in *Katzenbach* that the federalism costs exacted by § 5 preclearance could be justified by those extraordinary circumstances does not mean they can be justified in the circumstances of this case."

Thus, there is a real question whether the Tenth Amendment prohibits application of Section 5 preclearance requirements where, as here, there was no predicate evidence of wrongdoing by the targeted political subdivision.²¹

²¹ Monterey County was made subject to federal preclearance requirements not because of any proven discriminatory intent or discriminatory effect, but rather merely by the *mechanical application* of Section 5 standards to happenstance. Thus, the County became a "covered jurisdiction" under Section 5 "on and after August 6, 1970," only because (1) on November 1, 1968, the California Constitution included a literacy test for voting that was applicable in *all* counties, including Monterey County, and (2) this fact coincided with a determination that less than 50% of the voting age residents in the County had voted in the November 1968 presidential election. *See* 42 U.S.C. § 1973b(b); 35 C.F.R. Part 51 (Appendix); 35 Fed.Reg. 12354 (July 24, 1970); 36 Fed.Reg. (No. 60) 5809 (Mar. 27, 1971). However, nearly six months *before* August 6, 1970, the California Supreme Court struck down as unconstitutional the very

II. Even if the Court's Injunction Could Accurately Be Described as a Refusal to Intervene, Such A Remedy Would Be Appropriate in the Extreme Circumstances Presented Here

Although the election order from which this appeal is taken is plainly a modified injunction issued pursuant to the district court's remedial powers, Appellants insist upon characterizing it instead as a "failure to enjoin" the County's unprecleared election changes. Even if that characterization were accurate, however, the order would merit affirmance — particularly in view of the fact that the district court has not yet determined whether Section 5 has been violated.

Appellants argue, and the State concedes, that interdiction of an unprecleared voting practice, with perpetuation or resumption of the status quo, is the usual remedy for a failure of preclearance. (*See, e.g., Clark v. Roemer*, 500 U.S. 646, 111 S.Ct. 2096 (1991).) Here, of course, it remains to be seen whether the county-wide election of municipal court judges is in fact an "unprecleared voting practice" in violation of Section 5. Moreover, even putting that fact aside, injunctive

literacy test that was the basis for Monterey County's coverage under Section 5 of the Act. *Castro v. State of California*, 2 Cal.3d 223 (1970).

There is little likelihood that the test and the turnout were causally linked in any event. California's literacy test was applicable throughout the State, yet only two of California's 58 counties were deemed "covered" as a result of the 1970 amendments to the Voting Rights Act: Monterey County and Yuba County. 36 Fed.Reg. (No. 60) 5809 (March 27, 1971). This would suggest that factors other than racial or ethnic discrimination (e.g., alienage, military bases, prisons, migratory patterns, etc.) may have accounted for calculation of a "low voter turnout" in these counties. *Cf., Apache County v. United States*, 256 F.Supp. 903, 909-910 (D.C.D.C. 1966). Indeed, as the County stated in its Response to Appellants' Application for a Stay Pending Appeal, at p. 2, in 1968 Monterey County contained both the Fort Ord Army Base and the Naval Post Graduate School, as well as a state prison "housing several thousand convicted felons who [were] ineligible to vote." According to the 1960 Census, Fort Ord itself accounted for 32,723 of the County's total population of 198,351. *Id. at fn. 1.*

relief is not *always* a necessary remedy. (*Id.* at 654, 2102 ["We need not decide today whether there are cases in which a District Court may deny a § 5 plaintiff's motion for injunction and allow an election for an unprecleared seat to go forward."]) And, as Appellants concede, the Court in *Clark* suggested that it would be appropriate to permit implementation of such an unprecleared election change in "extreme circumstances." *Ibid.* And see Juris. Stmt. at p. 18. Hence, even if, arguendo, the district court's November 1995 order could fairly be categorized as a refusal to enjoin unprecleared election changes, the "extreme circumstances" test suggested in *Clark* is plainly met here in light of the unique posture of this case.

A. The Absence of Ascertainable Harm

Unless and until the court below determines that Section 5 in fact applies here and that preclearance requirements have not been met, there is no demonstration of "harm" which would warrant injunctive relief. Appellants' protestations to the contrary are, at this point, necessarily conjectural.

Further, the Court in *Clark* was not presented with the question of the constitutional propriety of *presuming*, as a basis for issuing an injunction against an unprecleared enactment, that state (or county) governments engage in race-based discrimination. However, the issue whether broad application of such a presumption is acceptable was certainly raised in *Miller*, where this Court considered the Justice Department's proposition that Georgia's failure to *maximize* minority voting strength was tantamount to discrimination. The Court warned that "the Justice Department's implicit command that States engage in presumptively unconstitutional race-based discrimination brings the Voting Rights Act, once upheld as a proper exercise of Congress' power under § 2 of the *Fifteenth Amendment* . . . into tension with the *Fourteenth Amendment*." (*Miller*, 115 S.Ct. at 2493, emphasis added. And see discussion of purpose of Section 5 in Argument I, pp. 15-16, *ante*.) Here, the State submits that the application of Section 5 to enjoin county-wide municipal court elections *in this case* is so

far divorced from the purposes underlying the Voting Rights Act as to raise serious questions whether any relief can be afforded Plaintiffs that is consistent with the Fourteenth Amendment – even if there is ultimately a final determination that Section 5 has been violated. After all, as noted in footnote 21, *ante*, Monterey County became a "covered jurisdiction" under Section 5 only by virtue of coincidence, and the California Supreme Court had struck down the offending statewide literacy test nearly six months *before* the County's period of Section 5 coverage began. Indeed, the California Supreme Court's ban on literacy tests antedated the *federal* ban on such tests by three months.²² So, unlike states which sought to *counter* federal court remedies with new obstacles to voting, California courts *anticipated* federal policies and *struck down* the offending literacy test *even before any political subdivision of the State became a covered jurisdiction*. Hence, this case presents a very different context from that addressed in *Katzenbach*.

Furthermore, the "voting practice"²³ at issue here developed as a series of consolidations over a period of 20 years,

²² The Voting Rights Act did not ban literacy tests outright until June 22, 1970. (See 42 U.S.C. § 1973aa; Pub. L. 89-110; and see, generally, *Oregon v. Mitchell*, 400 U.S. 112 (1970).)

²³ The State does not concede that the consolidation of justice court districts into municipal court districts is a "qualification, standard, practice, or procedure" within the meaning of Section 5 of the Voting Rights Act. The Voting Rights Act guarantees *equal* voting opportunities, without regard to race or ethnicity. However, the requirement that electoral districts be equipopulous – necessary for any rational determination whether voting rights are, in fact, equal – *does not apply to judicial districts*. (*Wells v. Edwards*, 347 F.Supp. 453, 454 (M.D.La. 1972), *aff'd*, 409 U.S. 1095 (1973).) Latino voters benefitted greatly from this anomaly, since they were able to constitute "majority" voting constituencies in three or four very small rural justice court districts in the County in 1968. For example, Latino residents make up 76% of the former Gonzales justice court district, but the total population of that district, adjusted to reflect 1990 census figures, is only 7,880 residents. (See Apx. 14a) In contrast, Latinos constitute only 40% of the total population, and only 23% of qualified voters, in the former Salinas municipal court district, which has a total of

with state legislative ratification and, on occasion, as a *direct result* of state legislative action. There is no evidence whatsoever that this evolution was motivated by anything other than a desire to improve the effective and efficient administration of justice in Monterey County, as Appellants have conceded.²⁴

There can be no ascertainable "dilutional" effect of the consolidations because, as has been discussed, in the wake of *Wells v. Edwards*, 347 F.Supp. 453, 454 (M.D.La. 1972), *aff'd*, 409 U.S. 1095 (1973) there is no standard based on equal population against which vote dilution might fairly be measured. (See fn. 23, *ante*.) And, as Appellants have stipulated, there is no evidence of intentional discrimination in the history of the consolidation. Accordingly, there would appear to be no *Fifteenth Amendment* justification for enjoining county-wide municipal court elections based upon any *presumption* of prohibited discrimination by the County. In such a circumstance, interdiction of county-wide elections in favor of *any device or plan* that increases existing Latino voting strength relative to non-Hispanics in the County runs afoul of the *Fourteenth Amendment*. (And see Argument IV, *infra*.)

Furthermore, disruption of a long-standing municipal court election scheme is a "serious intrusion onto the most vital of local functions" (*Miller*, 115 S.Ct. at 2488), and

146,858 residents – nearly 19 times the population of the Gonzales district. (*Ibid.*) Because the County's 1968 judicial districts were not equipopulous, the *true* relative voting strength of Hispanic and non-Hispanic voters within the County cannot be established. And, there being no *norm* by which to measure what Latino voting strength *should have been* in 1968, as compared with non-Hispanics within the County, a *change* in district lines, *standing alone*, cannot be said to affect the "equality of voting rights" guaranteed by the Voting Rights Act. When the "baseline" judicial districts are not even close to equipopulous, "[h]ow does one begin to decide . . . how much elective strength a minority bloc *ought* to have?" (See, *Chisom v. Roemer*, 501 U.S. 380, 415, 111 S.Ct. 2354, 2375 (1991) (Scalia, J., dissenting; italics in original).) This issue has not been addressed by the district court.

²⁴ See Parties' 2d. Stipulation at ¶ 3 (Apx. 2a.)

"[f]ederal courts may not . . . alter the state's form of government itself when they cannot identify 'a principled reason why one [alternative to the model being challenged] should be picked over another as a benchmark for comparison.'" (*Nipper v. Smith*, 39 F.3d 1494, 1532, (11th Cir. 1994), cert. denied, 115 S.Ct. 1795 (1995)²⁵, citing *Holder v. Hall*, ___ U.S. ___, 114 S.Ct. 2581, 2586 (1994); see also, *League of United Latin American Citizens v. Clements*, 999 F.2d 831, 871 (5th Cir. 1993), cert. denied, 114 S.Ct. 878 (1993) [weight of Texas' interest in scheme for judicial elections is a function of its sovereign prerogatives]; accord, *Republican Party of North Carolina v. Hunt*, 991 F.2d 1202, 1208 (4th Cir. 1993) (Phillips, J., dissenting from denial of rehearing *en banc*).)

B. The Unique Combination of Circumstances Weighs Against Enjoining County-Wide Elections

Here, the intrusive effect of a federal court order would be particularly evident. To be sure, the district court has already determined that the County failed, decades ago, to preclear its historical consolidation ordinances. But even if that finding were dispositive of the Section 5 question here (and it plainly is not), the State respectfully submits that, given the circumstances of this case, *there may be no remedy*, apart from county-wide elections, that would be consistent with the Fourteenth and Tenth Amendments.

The unique and extreme circumstances presented in this case include: (1) plaintiffs' protracted and unexplained delay in bringing their Section 5 action;²⁶ (2) the absence of a corollary Section 2 action; (3) Appellants' concession that

²⁵ In *Nipper*, the Eleventh Circuit held, *en banc*, that relief will be denied to a Section 2 plaintiff challenging judicial elections if the remedies sought would undermine the court's ability to administer justice.

²⁶ Courts may consider the undue passage of time as a factor in determining an appropriate temporary remedy. *Lopez v. Hale County, Texas*, 797 F.Supp. 547, 550-551 (N.D.Tex. 1992), *aff'd*, 113 S.Ct. 954 (1993).

there is no evidence of discriminatory purpose underlying the historical consolidation ordinances; (4) the interlocutory, one-time nature of the injunctive order from which the appeal is taken; (5) the fact that "[a] return to the status quo that existed before the enactment of the consolidation ordinances is not legal, feasible, or desired." (Juris. Stmt., App. 3; and see *Lopez*, 871 F. Supp. at 1257 and fn. 3); (6) the fact that, in conducting its judicial elections, the County may be administering intervening state statutes and constitutional provisions, rather than county ordinances; (7) the fact that the district court has not yet finally determined whether Section 5 applies to the challenged judicial election system; (8) the fact that the State has newly been added as a defendant and is free to raise new defenses on the merits of Appellants' claim, which may lead to outright dismissal of the action; (9) the fact that Appellants have not challenged the configuration of Monterey County;²⁷ (10) the fact that the historical consolidation ordinances have never been determined to be retrogressive and that, because of extreme disparities in the respective populations of 1968 judicial districts, such an analysis would be highly complex if not impossible;²⁸ (11) the possibility that

²⁷ As the district court observed in its November 1, 1995 order, the municipal court judges whose election is at issue here serve the entire county (unlike the justice court and municipal court judges who, in 1968, were elected from smaller districts within the County but also sat only in those smaller districts), "and no claim is made that the County itself was configured to deprive any racial or ethnic group of voting power." Juris. Stmt., App. 6. Furthermore, the California Constitution, Article VI, Section 16(b), reflects a state interest in having its judges' jurisdictional and electoral bases be coterminous.

²⁸ In light of the fact that the County's consolidation ordinances have never been shown to have any discriminatory effect, combined with appellants' admission that there is no evidence of discriminatory intent, not to mention the fact that there is no determination of a Section 5 violation, the argument asserted by appellants at page 23 of their Jurisdictional Statement – about the necessity for remedies which address the "discriminatory features" of a challenged system, or the "dilution of minority voting strength," or the "discriminatory effects of the past" – plainly has no application here.

the County's challenged ordinances may already have been precleared by the U.S. Attorney General in March 1995; (12) the fact that the County became a covered jurisdiction through mechanical application of a statutory formula, with no finding of unlawful purpose or discriminatory effect; and (13) the fact that the previous race-based court-ordered election plan of December 1994 is manifestly unconstitutional under *Miller*, having both an exclusively discriminatory purpose and a radically discriminatory effect. See Argument IV, *infra*.

Under these unprecedented circumstances, therefore, where the plaintiffs delayed so long in bringing their Section 5 action and in insisting upon preclearance, and where a return to the status quo ante has become unfeasible, Section 5 simply does not work as an appropriate vehicle for obtaining injunctive relief. That conclusion does not leave the plaintiffs completely without a remedy, however; rather, such plaintiffs remain free to seek their remedies, if any, under Section 2 of the Voting Rights Act. If such an action were brought, the plaintiffs would have a full opportunity to attempt to prove that the consolidation of justice court districts and/or municipal courts has had a prohibited discriminatory effect on Latino voting rights.²⁹

III. Appellants' Proffered Remedial Authorities Are Inapposite

Appellants cite numerous cases to this Court for the proposition that the district court is required to enjoin county-wide judicial elections if the Act is to be effectively enforced. Juris. Stmt. pp. 13-15. Those authorities may readily be distinguished, however. First, Appellants' cases all concern remedies issued *after the courts had determined that Section 5 preclearance was required and had not been obtained*,

²⁹ In any event, future elections conducted on a county-wide basis should not be interdicted unless there is a determination that, in conducting those elections, the County would be "administering" an election district configured by county ordinance and not by statute.

whereas here, as noted above, that elemental question remains unresolved. This distinction, alone, renders the cases inapposite. Second, none of Appellants' authorities involved a challenge which, as here, was limited to legislation which *had already been operative for 8 to 20 years before the Section 5 complaint was filed*, and none concerned a situation in which, as here, *it was not legal or feasible to return to the status quo*. Moreover, several of the cited cases also included alleged Section 2 violations or other indices of unlawful purpose by the covered jurisdiction. See, e.g., *Katzenbach*, 86 S.Ct. at 822 (Section 5 coverage and preclearance requirements justified because "some of the States . . . had resorted to the extraordinary stratagems of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decisions" [emphasis added]); *Allen v. State Board of Elections*, 393 U.S. 544, 89 S.Ct. 817 (1969) (Suits brought in 1966 and 1967 to challenge 1966 amendments to Mississippi Code and 1965 directive to Virginia registrars); *Perkins v. Matthews*, 400 U.S. 379, 91 S.Ct. 431 (1971) (Action filed in 1969 to enjoin 1969 election requirements which differed from those in effect for the most recent previous election (in 1965)); *Georgia v. United States*, 411 U.S. 526, 93 S.Ct. 1702 (1973) (1972 suit to enjoin 1972 reapportionment plan); *Connor v. Waller*, 421 U.S. 656, 95 S.Ct. 2003 (1973) (1975 suit challenging 1975 Mississippi reapportionment enactments); *U.S. v. Board of Supervisors*, 429 U.S. 642, 97 S.Ct. 833 (1977) (1973 suit to enjoin 1970 redistricting plan following U.S. Attorney General's post-1971 refusal to preclear the plan or to withdraw previous objections thereto); and *N.A.A.C.P. v. Hampton County Election Com'n.*, 470 U.S. 166, 105 S.Ct. 1128 (1985) (1983 suit to enjoin changes made in early 1983 respecting a March 1983 election).

Accordingly, these authorities provide no guidance in the unique circumstances presented here, where the question of Section 5 liability is yet unresolved, where the challenged

ordinances were implemented long ago, and where the passage of time has made a return to the 1968 status quo impossible.³⁰

IV. In Any Event, The Interim Order Directing County-Wide Elections is Consistent With Section 5 Standards; And, The Court's Previous Race-Based Election Plan is Unconstitutional and is Not a Valid "Benchmark"

Appellants further argue that the district court improperly disregarded "the retrogression standard" by ignoring the alleged "benchmark" status of its December 1994 emergency order. They contend that the court's December 20, 1994, one-time, emergency, interim election order, which was expressly and emphatically not a legislative plan or a legislative solution,³¹ must nonetheless be considered as the new starting

³⁰ As noted above, justice courts were eliminated in the State of California by 1994 constitutional amendment. Even in the absence of that amendment, however, all parties and the district court had agreed that it would be unduly costly and administratively impractical to attempt a return to the 1968 system of disparately sized justice and municipal courts. *Lopez*, 871 F.Supp. at 1257 and n. 3. Of course, plaintiffs' opposition to the traditional status quo remedy may also have stemmed from their realization that they might achieve drastic and unsupportable *increases* in Latino voting strength, *far beyond 1968 levels*, through stipulations with the County. See Apx. 14a-15a; 20a-21a at fn. 3.

³¹ In its December 20, 1994 decision, the court specifically limited the scope and impact of its election order: "[T]he plan is not being implemented as a legislative solution to the existing Voting Rights Act problem facing the County, but is rather being implemented by the court as an interim, emergency solution to insure the voters' right to elect municipal court judges." *Lopez*, 871 F.Supp. at 1259, n.7; emphasis added. Further, the court clearly stated that it did not approve or endorse the merits of the one-time plan: "The court does not intend by this order to pass judgment on the merits of the proposed election area plan as a potential permanent plan. That judgment is best left to legislators." *Id.* at 1261, n.8. And, it must be remembered that the district court *flatly rejected* the same race-based plan when it was submitted, in the County's Second Stipulation, as a legislative solution. See *Id.* at 1257.

point for measuring retrogression in any future plan. Appellants assert that the concededly race-based plan is the "... last legally enforceable practice or procedure used by the jurisdiction," within the meaning of 28 C.F.R. § 51.54(b). See Juris. Stmt., pp. 25-29. Their claim is quite without merit.

Appellants' theory would permit them to "hijack" the court's race-based one-time emergency order – which, as the State showed below, arbitrarily and radically realigned minority and non-minority voting strengths from the 1968 status quo³² – and convert it into, essentially, a permanent legislative plan from which there is no going back. Their argument ignores the fact that the court's one-time emergency order cannot be deemed a "legally enforceable practice or procedure used by [the County]" because, as the district court noted, the race-based scheme squarely violated two provisions of the California Constitution. See Juris. Stmt., App. 7. While the *district court* may have the power to suspend state constitutional provisions, the *County* plainly has no authority whatsoever to defy or to override limitations imposed upon it by the State's Charter. See Cal. Gov. Code, §§ 23002, 23012; *Richter v. Board of Supervisors*, 259 Cal.App.2d 99, 105 (1968); 68 Ops.Cal.Atty.Gen. 175, 177-178 (1985).

Appellants' argument also ignores the fact, made abundantly clear in *Miller*, that the interim race-based court-ordered plan – the purpose of which, the County later admitted, was *exclusively* discriminatory – is itself unconstitutional under the Fourteenth Amendment and violates both the letter and spirit of the Voting Rights Act. Hence, once again, the district court's previous order cannot be deemed a "legally enforceable practice or procedure." The County could never have lawfully promulgated or implemented such a plan.

Indeed, this 1994 court-ordered election system had not only a discriminatory *intent*, but a dramatically discriminatory *effect*, as well, when compared to 1968 conditions. The 1994 race-based plan radically increased Latino voting strength

³² See discussion, *infra*, at pp. 26-27 and fn. 33; and see Apx. 14a-15a; 20a-21a at fn. 3.

from the 1968 status quo, as measured by the percentage of total county population included in "majority-minority" electoral districts under the respective election schemes. Depending on how voting majorities are calculated, this percentage of population within majority-minority districts jumped from 10.63 percent to 27.42 percent (when "majority-minority" is measured by percentage of Latino *adults* in districts) or from 7.53 percent to 20.09 percent (when "majority-minority" is measured by percentage of Latino *adult citizens* in districts) under the December 1994 race-based plan. In either case, the discriminatory effect of the change was, obviously, enormous (see September 29, 1995 letter to district court, p. 3, n.3. [Apx. 20a at fn.3]) – even if one ignores the further gains in Latino voting power attributable to the *greatly expanded jurisdiction* accorded to current judges.³³ See Apx. 14a-15a. This arbitrary and drastic discrimination would be perpetuated forever if the race-based plan were treated as a "benchmark."

Finally, Appellants' argument ignores several significant distinctions between the instant circumstances and the cases upon which they rely. Appellants cite *McDaniel v. Sanchez*, 452 U.S. 130, 149 (1981); *State of Texas v. United States*, 785 F.Supp. 201, 204-205 (D.D.C. 1992); *State of Mississippi v. Smith*, 541 F.Supp. 1329, 1333 (D.D.C. 1982), *appeal dismissed* 461 U.S. 912 (1983); and *State of Mississippi v. United States*, 490 F.Supp. 569, 582 (D.D.C. 1979), *sum. aff'd.*, 444 U.S. 1050 (1980), for the proposition that the December 1994 one-time emergency order is somehow automatically converted into the foundational benchmark for future retrogression analysis. However, those cases manifestly

³³ In 1968, the County's justice court judges sat only over those districts in which they were elected; hence, judges elected in majority-minority districts *presided over only 7.53 or 10.63 percent of the County's population*, depending on the measure used. Apx. 14a. Under the December 1994 plan, this was increased astronomically: judges elected in the expanded race-based majority-minority districts now sit as judges of a single county-wide municipal court district (see Cal. Gov. Code § 73560), *presiding over 100 percent of the County's total population!*

have no application here, where there is no showing of retrogression, where the county consolidation ordinances have never been alleged to be, much less proven to be, unconstitutional, and where the court below has expressly stated that the plan appears to violate the Fourteenth Amendment in the light of *Miller*.

In *State of Texas v. United States*, 785 F.Supp. 201 (D.D.C. 1992), the court treated as a new benchmark an ongoing state legislative redistricting plan which had been carefully fashioned by a three-judge federal court and had been specifically deemed by that court to be "valid and equitable": "[The three-judge court] entered judgment 'to provide for a valid and equitable interim state legislative redistricting plan in the current circumstances in which no valid plan exists under federal law.'" *Id.*, at 203. In *State of Mississippi v. Smith*, 541 F.Supp. 1329 (D.D.C. 1982), too, the benchmark references were to a court-ordered reapportionment plan that the three-judge court was confident had been necessary and valid for state compliance with the Voting Rights Act, and the plan had been imposed by the court for an indefinite duration. It was to "remain[] in effect until a redistricting plan enacted by the State of Mississippi is precleared . . ." *Id.*, at 1332. And in *State of Mississippi v. United States*, 490 F.Supp. 569 (D.D.C. 1979), the court-ordered reapportionment plan cited as a new benchmark was a plan which the court and the parties had developed, through a long and painstaking process, and which the court adopted pursuant to instructions from the Supreme Court. *Id.*, at 571-574.

Here, in contrast, the district court did not itself fashion any plan (except to shorten terms of office), the court expressly *rejected* the County's legislative plan as invalid (i.e. devoid of any showing that it was necessary or appropriate to violate state districting principles in the manner proposed), the court expressly refused to approve or endorse the merits of the proposed plan, the court later noted that the plan apparently violated the Fourteenth Amendment, and the plan is concededly based exclusively on racial considerations. The court made use of the pre-*Miller* race-based plan only on a

one-time basis, with uniquely short terms for judges elected thereunder, out of frustration at the voters' long wait for appropriate action by the County. And in doing so, *the court specifically held that the emergency order would have no precedential effect*, noting that "ultimately an at-large system or a system different from either of the two proposed alternatives may prove, under the totality of circumstances, to be the best judicial election system." *Lopez*, 871 F.Supp. at 1259.

In short, there is no valid comparison between the instant circumstances and the cited cases, and it would be neither appropriate nor constitutionally permissible to treat the court's one-time race-based emergency order on a par with the judicial remedies considered in those cases.³⁴ Appellants' argument was properly rejected by the three-judge court:

³⁴ Nothing in the case of *McDaniel*, 452 U.S. 130, 149 (1981), or in the U.S. Attorney General's regulations (*see* 28 C.F.R. § 51.54(b)) remotely suggests that it is appropriate, much less required, to recast the district court's carefully limited one-time emergency order – a race-based plan which was judicially rejected when proffered as a legislative solution – into a permanent standard against which any and all future election plans must be measured. Indeed, appellants' reliance on *McDaniel* is quite misplaced. *McDaniel* addresses the status of "redistricting [which] is ordered by a federal court to remedy a constitutional violation that has been established in pending federal litigation." (*Id.* at 148; emphasis added.) Here, in contrast, plaintiffs have not even alleged, much less established, a "constitutional violation;" their complaint is grounded exclusively on an alleged *technical* failure to obtain preclearance decades ago – a failure not yet conclusively shown to be relevant. Indeed, the only constitutional violation before the Court here is the discriminatory, race-based, December 1994 court-ordered election which appellants now seek to perpetuate.

Connor v. Finch, 431 U.S. 407, 415, 97 S.Ct. 1828, 1834 (1977) likewise supports affirmance here. In *Connor*, the Court emphasized that district courts' remedial orders must be achieved "free from any taint of arbitrariness or discrimination." That is precisely what the court below endeavored to do through its November 1, 1995 election order, by putting an end to the *concededly discriminatory and undeniably arbitrary 1994 election scheme* which is now championed by appellants. The consolidated municipal court and the county-wide election scheme, in contrast, have

The court doubts whether the prior interim plan can be considered 'legally enforceable' within the meaning of [28 C.F.R. § 51.54(b)], because it suspended otherwise applicable provisions of state law and was adopted only on an emergency basis. Further, given the reasoning of *Miller*, the court cannot say that a county-wide election plan is necessarily unlawfully retrogressive in comparison with the prior plan or the system in effect prior to the consolidation ordinances.

Juris. Stmt., App. 7.

CONCLUSION

For the foregoing reasons, Appellee State of California respectfully submits that the November 1, 1995 interlocutory injunctive order below, directing that 1996 elections for municipal court judges in Monterey County be conducted on a county-wide basis, should be affirmed, or, alternatively, that Appellants' appeal from that interlocutory injunctive order should be dismissed.

Dated: February 28, 1996.

Respectfully submitted,

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never been shown to be anything but fair, good faith efforts to achieve efficiencies and economies in the administration of justice while conforming to normal state districting principles.

INDEX TO APPELLEE'S APPENDIX

	Page
Excerpt From Plaintiffs' and County's Second Stipulation and Court Order (Jan. 13, 1994)	1a
Order Granting Motion to Intervene and Denying Motion to Modify Orders (April 13, 1995)	6a
Order Re Briefing for Status Conference (Sept. 7, 1995)	10a
Excerpt from Reporter's Transcript of Status Conference (Sept. 28, 1995)	11a
Demographic Data Re: County's 1968 Judicial Districts (From Ex. A to County Counsel's Mar. 16, 1994 Declaration Re: Resolution No. 94-107)	14a
Demographic Data Re: Court's 1994 Judicial Election Sub-Districts (From Ex. J to County Counsel's Mar. 16, 1994 Declaration Re: Resolution No. 94-107) ..	15a
State's September 29, 1995 Letter to District Court	16a
State's Answer to Plaintiffs' Complaint (Nov. 20, 1995)	24a

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IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA

VICKY M. LOPEZ,)	
CRESCENCIO PADILLA,)	
WILLIAM A. MELENDEZ,)	
JESSE G. SANCHEZ, and)	
DAVID SERENA,)	
Plaintiffs,	)	Civil Action No.
	)	C-91-20559-RMW (EAI)
v.)	
MONTEREY COUNTY,	)	Voting Rights Action
CALIFORNIA,	)	Three Judge Court
Defendant,)	
STATE OF CALIFORNIA,)	
Defendant-Intervenor.)	
)	

PARTIES SECOND STIPULATION AND
 COURT ORDER

The Plaintiffs, Vicky M. Lopez, *et al.*, and Defendant Monterey County, California in order to permit the adoption of an election system for the election of Municipal

Judges to the Monterey County Municipal Court District hereby stipulate as follows:

1. Both the Plaintiffs and the Defendant want to settle this litigation to enforce Section 5 of the Voting Rights Act and avoid any future litigation.

2. As a result of this Court's Order dated March 31, 1993, Defendant Monterey County was required to submit municipal court judicial district consolidation ordinances, which were adopted between 1968 and 1983, for approval pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973 c. As a result of this Court's Order, Monterey County filed a declaratory judgment action pursuant to Section 5 seeking judicial approval of these consolidation ordinances. *Monterey County v. United States of America*, Civil Action No. 93-1639 (CRR) (D.C. Dist. Colum. 1993). By an Order filed on September 7, 1993, the United States District Court for the District of Columbia permitted the Plaintiffs in this action to intervene as defendants-intervenors in the *Monterey County v. United States of America* action.

3. Plaintiffs acknowledge that as of the date of this Stipulation they had not discovered any evidence that Monterey County's adoption of the municipal court judicial district consolidation ordinances had the purpose or the intent of denying or abridging the right to vote within the meaning of Section 5 of the Voting Rights Act. Monterey County, however, stipulates that it is unable to establish that these ordinances did not have the effect of denying the right to vote to Hispanics in Monterey County due to the retrogressive effect several of these ordinances had on Hispanic voting strength in Monterey

County. For this reason, Monterey County agreed not to enforce these municipal court judicial district consolidation ordinances in future elections for the Monterey County Municipal District Court. As a result of this agreement, the United States of America, Monterey County, and the *Lopez, et al.*, defendants-intervenors stipulated to a dismissal of the action in the District of Columbia federal court.

4. Monterey County and the Plaintiffs in this action have agreed to the implementation of an election system for the election of municipal court judges to the Monterey County Municipal Court District. This agreement only affects the electoral process and does not affect a municipal court's countywide jurisdiction. Both the Plaintiffs and the Defendants agree that the Monterey County Municipal Court District shall be divided into four divisions. For the purpose of election of judges, the term "division" as used in this stipulation and proposed Court Order is and shall continue to be the "district" referred to in subdivision (b) of Section 16 of the Article VI of the Constitution of the State of California. Except as otherwise expressly provided in this paragraph, the term "district" as used in this stipulation and proposed Court Order shall mean a countywide municipal court district and shall be the "district" referred to in Section 5 of Article VI of the Constitution of the State of California and Chapters 6 and 8 of Title 8 of the Government Code of the State of California.

5. Both Monterey County and the Plaintiffs believe that if this Court does not approve and issue the Order as proposed, Monterey County will not be able to adopt and implement any election system for municipal court

judges which will secure the necessary approval pursuant to Section 5 of the Voting Rights Act. Should Monterey County not be permitted to implement a Municipal Court Division Plan which secures the requisite Section 5 approval, then this Court will be faced with the task of fashioning a court-ordered plan. In order to avoid any additional expenditure of judicial resources, Monterey County and the Plaintiffs have agreed to the implementation of a Municipal Court Division Plan, as generally described in the proposed Order, which will secure the requisite Section 5 approval. Any conflict between any California law and the provisions of this order should be resolved in favor of the Order, in order to ensure full compliance with the Voting Rights Act.

6. Monterey County seeks to have in place a Municipal Court Division Plan for the election of municipal judges to the Monterey County Municipal Court District in time for the commencement of the June 1994 election process, at least insofar to ensure elections in two of the proposed divisions. The Plaintiffs and Monterey County have previously provided the Court with an amended election schedule which will permit the June 1994 election process to proceed.

7. Monterey County will seek Section 5 approval of the Municipal Court Division Plan, consistent with the Order, from the United States Attorney General. Representatives from the United States Attorney General have informed us that expedited review of the Municipal Court Division Plan submission will be given serious consideration to accommodate the impending election schedule. In view of the impending election schedule, Monterey County will submit a Municipal Court Division

Plan to the United States Attorney General for expedited review. Once Section 5 approval is secured, the Municipal Court Division Plan can be implemented in time for the June 1994 elections. Should this Court not grant the requested Order, then proceedings should be initiated for the implementation of a court-ordered plan and an appropriate election schedule.

DATED: January 13, 1994

JOAQUIN G. AVILA
BARBARA Y. PHILLIPS

By: /s/ Joaquin G. Avila
JOAQUIN G. AVILA
Attorney for Plaintiffs

DATED: January 13, 1994

DOUGLAS C. HOLLAND

By: /s/ Douglas C. Holland
DOUGLAS C. HOLLAND
Attorney for defendant Monterey County

ORDER

Based upon the Parties Stipulation, this Court hereby ORDERS Monterey County to adopt and implement a Municipal Court Division Plan for municipal court judges which will secure the requisite approval pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973 c. Monterey County has stipulated that the municipal court judicial district consolidation ordinances, which are the

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

VICKY LOPEZ,
CRESCENCIO PADILLA,
WILLIAM A. MELENDEZ,
JESSIE G. SANCHEZ, and
DAVID SERENA,

Plaintiffs,

v.

MONTEREY COUNTY,
CALIFORNIA,

Defendant.

NO. C 91-20559-RMW
(EAI)

ORDER GRANTING
MOTION TO
INTERVENE AND
DENYING MOTION TO
MODIFY ORDERS
DATED DECEMBER 20,
1994 AND JANUARY
10, 1995

(Filed April 13, 1995)

On March 10, 1995, Judge Stephen A. Sillman, Presiding Judge of the Monterey County Municipal Court ("Municipal Court"), moved to intervene in his official capacity in this action for the purposes of (1) seeking modification of the court's December 20, 1994 and January 10, 1995 orders (collectively, "the Election Order") and (2) representing the interests of the Municipal Court in future proceedings. Under the modification proposed by Judge Sillman, the terms of office of those elected in 1995 pursuant to the Election Order would be extended from one year to six years retroactive to 1994. The court set March 29, 1995 as a deadline for responses from any party wishing to either respond to Judge Sillman's motion to intervene or independently move for a modification of the Election Order.

Plaintiffs and the State of California have filed statements of non-opposition to Judge Sillman's proposed

intervention and modification of the Election Order. The United States has filed a response in which it urges the court to defer an extension of terms until a later date, the United States does not appear to oppose Judge Sillman's proposed intervention. Defendant Monterey County ("the County") has filed both a motion to modify the Election Order in accordance with Judge Sillman's proposal and an opposition to Judge Sillman's motion to intervene.

In light of Judge Sillman's interest in the efficient administration of the Monterey County Municipal Court, the court grants his motion to intervene in his official capacity as Presiding Judge of the Municipal Court. Judge Sillman's participation in this action is not precluded by the holding in *League of United Latin American Citizens v. Clements*, 884 F.2d 185 (5th Cir. 1989), where the judges seeking to intervene asserted an interest in the "legislative action" of redistricting, *id.* at 188. Here, by contrast, Judge Sillman is seeking to protect the administration of justice in Monterey County, a concern independent from an interest in the configuration of particular districts.

Additionally, the court denies without prejudice the County's motion to modify the Election Order to extend the terms of those elected in 1995. The court has considered the concerns raised by the County and Judge Sillman about the cost of conducting back-to-back elections in 1995 and 1996, the interference with judicial administration that could result therefrom, and the impracticability of the parties' reaching a permanent solution before 1996. On the other hand, the court is reluctant and unwilling at this time to establish six-year terms under an

election plan that is designed to be an emergency, temporary solution to a problem most appropriately addressed through legislative action.

The court hereby sets a status conference for September 28, 1995 at 1:30 p.m. At least five days before the status conference, each party shall file a statement showing:

- (1) what efforts have been made to implement a permanent solution;
- (2) whether a permanent plan will be in effect for the 1996 general election; and
- (3) if a permanent plan will not be in effect in 1996, when such implementation is anticipated.

Copies of each party's statement should be sent directly to the chambers of each of the judges on the panel.

DATED: 4/10/95

/s/ Ronald M. Whyte
 RONALD M. WHYTE
 United States District Judge
 On Behalf of the Panel

Copy of Order mailed on 4/13/95 to:

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Vicky M. Lopez et al.,	NO. C-91-20559 RMW(EAI)
Plaintiffs,	Order Re Briefing for
v.	Status Conference
Monterey County,	(Filed Sep. 7, 1995)
California,	
Defendant.	
<hr/>	
State of California	
Intervenor-Defendant	

The parties are hereby requested to brief the effect of *Miller v. Johnson*, 95 Daily Journal D.A.R. 8495 on this case in their status conference statements for the status conference on September 28, 1995 at 1:30 p.m.

DATED: 9/6/95

/s/ Ronald M. Whyte
RONALD M. WHYTE
United States District Judge
On Behalf of the Panel

COPY

Pages 1-56

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
BEFORE THE HONORABLES
RONALD M. WHYTE, JUDGE
THE HONORABLE MARY SCHROEDER, JUDGE
THE HONORABLE JAMES WARE, JUDGE

VICKY M. LOPEZ, CRESCENCIO)	
PADILLA, WILLIAM A.)	
MELENDEZ, JESSE G. SANCHEZ,)	
AND DAVID SERENA,)	Case No.
Plaintiffs,)	C-91-20559
vs.)	
MONTEREY COUNTY,)	
CALIFORNIA,)	
Defendant.)	

Thursday, September 28, 1995
San Jose, California

Reporter's Transcript of Proceedings

APPEARANCES

For the Plaintiffs

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Reported by

Lee-Anne Shortridge
Certified Shorthand Reporter #9595

Appearances Continued on Next Page
Computerized Transcription by StenoCat

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For the Intervenor

State of California

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For the Intervenor

Judge Stephen A. Sillman

Nielsen, Merksamer, Parrinello,
 Mueller & Naylor
 Marguerita Mary Leoni,
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 591 Redwood Highway, Suite 4000
 Mill Valley, California 94941

* * *

[p. 16] that bothers me. I'm very scared as to what that does to the County in trying to go back to that situation. Clearly when you hear the State make that argument, that's a possibility that is out there, and that's the reason, that's one of the reasons, why the County was very apprehensive about attempting to secure pre-clearance knowing that some of them we could get pre-cleared, other ones, we were not convinced we could do so.

JUDGE WHYTE: Do you feel the *Miller versus Johnson* case raises some questions about the constitutionality of the plan that was approved as an interim emergency plan?

MR. HOLLAND: No, I do not, Your Honor.

JUDGE WHYTE: And the reason?

MR. HOLLAND: The reason is it was an interim remedy to deal with a specific situation. I will be the first one to admit the reasons for the rationale for the boundaries were in fact race generated. There's no question about it. That was the sole motivation. Nothing else went into those considerations. To the extent any other factor went in, it was entirely secondary. There's no question about that.

But I think that it was also necessary in order to resolve a particular problem that we were in at that time. We were looking at, quite frankly, again, looking at what the status quo ante is. Status quo ante is in a multi-district court system that would have had four minority, or four

* * *

**Estimate of Ordinance 1597 Judicial District Populations, Modified to Keep Cities Intact
1990 U.S. Census Date**

	Castroville- Pajaro	Gonzales	Greenfield	King City	Monterey- Carmel	Pacific Grove	Salinas	San Ardo	Soledad Including All	Soledad Excluding Prison	Total
Total Population	39,878	7,880	8,987	10,842	105,730	16,131	146,858	3,891	15,461	9,465	355,660
Latino	41%	76%	74%	61%	9%	6%	40%	26%	63%	80%	33%
White (NH)	52%	18%	22%	36%	71%	87%	43%	67%	19%	14%	52%
API	5%	5%	2%	1%	8%	5%	10%	2%	2%	4%	8%
Black	1%	1%	1%	1%	11%	1%	6%	4%	14%	1%	6%
IEA (NH)	1%	0%	1%	0%	1%	1%	1%	1%	0%	0%	1%
Other (NH)	0%	0%	1%	0%	0%	0%	0%	0%	1%	0%	0%
Population 18 +	27,472	4,960	5,577	7,123	83,431	13,287	100,988	2,798	12,072	6,076	257,709
Latino	36%	71%	71%	57%	8%	5%	35%	21%	56%	76%	28%
White (NH)	55%	21%	26%	40%	74%	88%	48%	71%	22%	18%	57%
API	6%	6%	2%	1%	8%	5%	11%	2%	2%	4%	8%
Black	1%	1%	1%	1%	10%	1%	6%	4%	18%	1%	6%
IEA (NH)	1%	0%	1%	0%	1%	1%	1%	1%	0%	0%	1%
Other (NH)	0%	0%	1%	0%	0%	0%	0%	0%	2%	0%	0%
Citizens 18 + (Estimated)											
Latino	23%	54%	51%	36%	6%	5%	23%	10%	39%	62%	17%
White (NH)	68%	37%	44%	60%	78%	90%	60%	81%	31%	31%	68%
API	6%	7%	3%	2%	5%	4%	9%	2%	2%	4%	7%
Black	2%	1%	1%	1%	10%	1%	7%	5%	26%	2%	8%
IEA (NH)	1%	1%	1%	1%	1%	1%	1%	2%	0%	1%	1%
Other (NH)	0%	0%	0%	0%	0%	0%	0%	0%	2%	0%	0%

NH = Non-Hispanic

IEA = American Indian, Eskimo, or Aleut

API = Asian or Pacific Islander

Columns may not appear to total 100 percent because of rounding.

**Monterey County Municipal Court Districts
Summary Table
Plan 7B**

	1	2	3 Including All	Excluding Prison	4	Total
Total Population	35,691	34,547	31,630	25,634	253,792	355,660
Latino	75%	74%	55%	59%	18%	33%
White (NH)	17%	17%	35%	37%	64%	52%
API	5%	7%	1%	2%	9%	8%
Black	2%	2%	8%	1%	8%	6%
IEA (NH)	1%	0%	1%	1%	1%	1%
Other (NH)	0%	0%	1%	0%	0%	0%
Population 18+	22,220	21,797	22,836	16,842	190,854	257,709
Latino	69%	69%	49%	54%	16%	28%
White (NH)	22%	21%	37%	42%	58%	57%
API	5%	7%	1%	2%	9%	8%
Black	2%	2%	11%	2%	7%	6%
IEA (NH)	1%	1%	1%	1%	1%	1%
Other (NH)	0%	0%	1%	0%	0%	0%
Citizens 18 + (Estimated)	12,950	12,649	16,049	11,313	170,088	211,735
Latino	52%	52%	30%	33%	11%	17%
White (NH)	37%	35%	52%	61%	74%	68%
API	7%	8%	1%	2%	7%	7%
Black	3%	3%	14%	2%	8%	8%
IEA (NH)	1%	1%	1%	1%	1%	1%
Other (NH)	0%	0%	1%	0%	0%	0%

NOTE: Latino percentages exclude Hispanic Blacks and Hispanic APIs. A district's Hispanic percentage may be one percentage point higher than a district's Latino percentage.

NH = Non-Hispanic

IEA = American Indian, Eskimo, or Aleut

API = Asian or Pacific Islander

Columns may not appear to total 100 percent because of rounding.

Largest District	36,256
Smallest District	31,630
Difference	4,626
Ideal District	35,566
Deviation	13.0%

Lapkoff Gobalet Demographic Research, Inc.

DANIEL E. LUNGREN
Attorney General

State of California [SEAL]
DEPARTMENT OF JUSTICE

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September 29, 1995

By Facsimile Transmission

Hon. Mary M. Schroeder, Circuit Judge
Hon. James Ware, District Judge
Hon. Ronald M. Whyte, District Judge
UNITED STATES DISTRICT COURT
280 South First Street
San Jose, California 95113

RE: *Lopez v. Monterey County*
No. C-91-20559-RMW

Dear Judges Schroeder, Ware, and Whyte:

The State of California respectfully requests leave to file this supplemental letter. Questions from the Court argument yesterday, concerning the extent of the State's participation in these proceedings, raised a number of issues which should be more fully illuminated.

In answer to Plaintiffs' Complaint in this action, the County averred that the State of California was a necessary party to the proceedings because, by conducting elections in a county-wide municipal court district, the County was merely implementing state law. Plaintiffs successfully resisted the County's efforts to join the State

as a party. The Court specifically concluded that "complete relief is possible among the parties already involved in this action since the only issue which this court may properly address is whether the particular County ordinances at issue herein are subject to the provisions of the Voting Rights Act, and therefore must be submitted for approval before enactment." (Order Granting Plaintiffs' Motion for Partial Summary Judgment and Denying Defendant's Motions, p. 6.)¹ However, once the parties proposed to this Court a temporary remedial plan that called for the effective suspension of the State Constitution and state statutes, a new issue was necessarily presented, viz., whether disregard of state laws is necessary in order to effectuate Section 5 of the Voting Rights Act.

¹ The California Constitution specifically states that "[e]ach county shall be divided into municipal court districts as provided by statute. . . ." (Cal. Const., art. VI, § 5(a); see Cal. Gov. Code § 73560.) Nevertheless, because the case was litigated on the theory that the *only* issue to be decided was whether the ordinances needed to be precleared, the State was not made a party to these proceedings and was not afforded an opportunity to defend on the merits of Plaintiffs claim. Accordingly, this Court's determination that the County's consolidation ordinances required preclearance would arguably not be binding on the State (see, e.g., *Truchninski v. Cushman*, 257 N.W.2d 286 (Minn. 1987); *Arnold Graphics Indust., Inc. v. Independent Agent Centers, Inc.*, 775 F.2d 38 (2d Cir. 1985)), and, pursuant to the state Constitution, the Legislature would be free to enact new, superseding statutes defining a county-wide municipal court district in Monterey. On this basis, it could certainly be argued that, in order to afford complete relief, the State should have been joined as a party and afforded an opportunity to raise any and all available defenses to the merits of Plaintiffs' claim. (See, *Sierra Club v. Leathers*, 754 F.2d 952 (11th Cir. 1985).)

No evidence whatsoever has been presented to this Court to establish that the prohibition against dividing cities (Cal. Const., art. VI, § 5(a)), or the constitutional linkage between the electoral base of a judge and the district over which the judge presides (Cal. Const., art. VI, § 16(b)) themselves violate the Voting Rights Act or are in any other manner unlawful. Certainly the adoption of these provisions by the citizens of California has not even been alleged to have been unlawful. Under such circumstances it is highly doubtful that this Court has jurisdiction to relieve the County of the obligation to comply with presumptively lawful state constitutional provisions in the drawing of municipal court district lines. Nevertheless, both Plaintiffs and the County contend that this is precisely what has already occurred – whether or not this court ever intended that such an effect by given its temporary order.

Clearly, the State of California has an interest in ensuring that its political subdivisions comply with the California Constitution in respect to the drawing of municipal court district lines. In view of the parties' characterization of the Court's action thus far – and their manifest intent to persist in characterizing this Court's order as having relieved the county of the obligation to comply with the State Constitution – if this court is going to take any action other than to dismiss the Complaint as moot,² the Court must vacate its earlier order *denying* the

² The Court has an obligation to assess its jurisdiction at every stage of the proceedings, on its own motion. (See, *Morongo Band of Mission Indians v. Cal. State Bd. Equalization*, 849 F.2d 1197, 1199 (9th Cir. 1988); *Ragsdale v. Turnock*, 841 F.2d 1358, 1365

County's motion to join the State as a necessary party, and instead *grant* that motion, thereby permitting the State to be joined as a full party defendant with the right to raise and litigate any and all available defenses to the

n. 5 (7th Cir. 1988); *Klein v. AMFAC, Inc.*, 688 F.Supp. 1415, 1416 (N.D. Cal. 1988); *Adesanya v. United States*, No. C-92-0658 EFL, 1992 U.S.Dist. LEXIS 2488, p. 4 (N.D. Cal. 1992).) The State asserts that the instant matter may be moot because the consolidation ordinances were superseded by state law both in 1979 (Cal. Stats. 1979, ch. 694, § 1) and in 1989 (Cal. Stats. 1989, ch. 608, § 1) Furthermore, the State has already pointed out that, without regard to the effect of the *Legislature's* definition of the municipal court district, it is arguable that the County's adoption of some consolidation ordinances would necessarily render moot the question whether the *previous* consolidation ordinance needed to be precleared prior to "administration" in the next election – since *that* election would presumably be conducted pursuant to the *subsequent* consolidation ordinance, rather than pursuant to the earlier unprecleared ordinance. In addition, at the hearing on September 28, 1995, the Court was made aware of a letter from the Department of Justice that has been in Plaintiffs' possession since early March. That letter expressly states that "[t]he Attorney General does not interpose any objection to the *municipal court consolidation*, the interim election plan, the districting plan (as modified), the term of office, the procedures for conducting a June 6 special primary and an August 1 special runoff, and the additional judgeship." (Emphasis added). Plaintiffs' contention that the Department of Justice [sic] precleared the underlying consolidation ordinances (the letter expressly notes that the County submitted for preclearance "the consolidation of the municipal and justice courts that existed on November 1, 1968, into a single municipal court with nine judgeships" and "the establishment of a tenth municipal court judgeship") because there is now a court-ordered election plan is a *non sequitur*. Since the consolidation of the 1968 districts has been precleared, then the requirements of 42 U.S.C. § 1973c have been satisfied, and the instant case is now moot.

prosecution of this action by Plaintiffs. Such defenses include, but would not necessarily be limited to, an assertion that the action is barred by laches or by a statute of limitations; a denial that the consolidation of judicial districts, with nothing more, is a voting practice subject to preclearance under Section 5; and a defense of mootness.

Furthermore, if the Court declines to dismiss the action as moot and instead, grants the County's motion to join the State as a necessary party, then the Court should vacate its April 1, 1993-Order Granting Plaintiffs' Motion for Partial Summary Judgment and Denying Defendant's Motions. In accordance therewith, until the merits are determined upon motion by *all* proper parties, the Court should permit future municipal court judicial elections to take place in the county-wide district as defined by Cal. Gov. Code § 73560.³ Not only should future elections

³ As was explained yesterday, the State maintains that the huge, "grapes to watermelons" disparity in the sizes of judicial districts in Monterey County in 1968 poses a very serious problem in defining "minority voting strength" for purposes of Section 5. That is to say, there is no apparent "baseline" from which to determine whether retrogression occurred thereafter. Certainly none was defined by the U.S. Department of Justice or the District Court for the District of Columbia.

Nevertheless, there is a rather simple, intuitively obvious means of comparing the 1968 majority-minority districts with the majority-minority districts fashioned in this Court's emergency interim race-based order, and that is to compare the percentage of the County's total population that is included in these districts, using the data submitted by the County. (See Holland Decl., Resolution No. 94-107, Ex. A, p. 1; Ex. J, p. 1.) This straightforward comparison reveals that the emergency plan has *radically increased Latino voting strength* in the County,

proceed undisturbed because the merits of the underlying claim have not been litigated by all parties who should be before the Court, but they should proceed undisturbed because, without a "strong basis in evidence

and has dramatically reduced non-Latino voting strength – even without considering the fact that judges elected under the court-ordered plan are permitted to sit as judges of the entire county. If consideration is given to the voting-age non-prison populations, without regard to citizenry, then four of the 1968 judicial districts were "majority-minority" districts: Gonzales (pop., 7,880; 71% Latino); Greenfield (pop. 8,987; 71% Latino); King City (pop. 10,842; 57% Latino); and Soledad (pop. 9,465 [non-prison]; 76% Latino). However, these districts accounted for *only* 10.63 percent of the total County (non-prison) population of 349,662. Applying this same analysis to the court-ordered race-based emergency plan, all but District 4 are majority-minority districts: District 1 is 69% Latino; District 2 is 69% Latino; and District 3 (non-prison) is 54% Latino. The combined total non-prison population of these three districts is 95,872, or 27.42 percent of the total County (non-prison) population.

A similar dramatic change is seen if the focus is limited to voting-age non-prison *citizen* populations. Latino voting-age *citizens* constituted a majority of only three judicial districts in 1968: Gonzales (54%); Greenfield (51%); and Soledad (62%), with a combined non-prison population of only 26,332, or 7.53 percent of the County's total non-prison population. In 1995, using this analysis, only District 1 (52%) and District 2 (52%) have Latino majorities; the total population of these two districts (70,238) comprises 20.09 percent of the County's total non-prison population.

— Furthermore, as the State has already pointed out, because the districts were not equipopulous, and because elected judges sat only in their respective districts, such districts may not be treated as comparable for purposes of assessing equality of relative voting strength, without at least some fair "weighting" of the data to account for differences in size.

of the harm being remedied" (*Miller v. Johnson*, 115 S.Ct. 2475, 2491 (1995)), there is no justification [sic] to diminish the voting strength of non-Latino voters in Monterey County relative to Latino voters in the County.

Sincerely,

DANIEL E. LUNGREN
Attorney General of California
DANIEL G. STONE
Deputy Attorney General

/s/ Manuel M. Medeiros
MANUEL M. MEDEIROS
Deputy Attorney General

cc: All Counsel (by FAX transmission)

DECLARATION OF SERVICE

Case Name: *Vicky M. Lopez, et al v. Monterey County, California*

Case No.: C-91-20559 RMW (eai)

I declare:

I am employed in the County of Sacramento, California. I am 18 years of age or older and not a party to the within entitled cause; my business address is 1300 I Street, P.O. Box 944255, Sacramento, California 94244-2550.

On *October 2, 1995*, I served the attached

STATE'S SUPPLEMENTAL LETTER

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United

States Mail at Sacramento, California, addressed as follows:

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95035-7014

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591 Redwood Highway, #4000
Mill Valley, California 94941

Deval L. Patrick
SaraBeth Donovan
Civil Rights Division
Department of Justice
P.O. Box 66128
Washington, DC 20035-6128

I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on October 2, 1995, at Sacramento, California.

MICHELLE L. LEVY
Name

/s/ Michelle L. Levy
Signature

DANIEL E. LUNGREN, Attorney General
of the State of California
LINDA CABATIC, Supervising
Deputy Attorney General
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Attorneys for Defendant
State of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

VICKY M. LOPEZ, <i>et al.</i>,	)	No. C-91-20559 RMW
Plaintiffs,	)	(Three-Judge Court)
v.	)	STATE OF CALIFORNIA'S
MONTEREY COUNTY,	)	ANSWER TO COMPLAINT
CALIFORNIA;)	
STATE OF CALIFORNIA,)	
Defendants.	)	(Filed
	)	Nov. 20, 1995)
STEPHEN A. SILLMAN,)	
Intervenor.)	

COMES NOW defendants STATE OF CALIFORNIA ("State"), pursuant to the Court's November 1, 1995 order joining the State as an indispensable party defendant, and answers the complaint for declaratory and injunctive relief on file in this purported Voting Rights Action as follows:

1. Answering paragraph 1, admits that the statutes, regulations, codes, and/or constitutional provisions cited therein speak for themselves. The remaining allegations contained in the paragraph 1 are merely argument, requiring no response by defendants; to the extent a response is required, the State denies each and every allegation contained therein.

2. Admits the allegations contained in paragraph 2.

3. Lacks sufficient information or belief to answer the allegations contained in paragraph 3, and, basing denial on that ground, denies each and every allegation contained therein.

4. Admits the allegations contained in paragraph 4.

5. Admits the allegations contained in paragraph 5.

6. Admits the allegations contained in paragraph 6.

7. Answering paragraph 7, admits that the statutes, regulations, codes, and/or constitutional provisions cited therein speak for themselves. The remaining allegations contained in the paragraph 7 are merely argument, requiring no response by defendants; to the extent a response is required, the State denies each and every allegation therein, and specifically denies that the Monterey County Board of Supervisors has any authority whatsoever to create, designate, modify, or consolidate justice court districts.

8. Admits the allegations contained in paragraph 8.

9. Denies each and every allegation contained in paragraph 9.

10. Denies each and every allegation contained in paragraph 10.

11. Denies each and every allegation contained in paragraph 11.

12. Denies each and every allegation contained in paragraph 12.

13. Admits the allegations contained in paragraph 13.

14. Admits the allegations contained in paragraph 14.

15. Admits the allegations contained in paragraph 15; however, defendant denies that, in conducting elections for municipal court judges, the County is implementing Ordinance No. 2524.

16. Denies each and every allegation contained in paragraph 16.

17. Denies each and every allegation contained in paragraph 17.

18. Admits the allegations contained in paragraph 18.

19. Admits the allegations contained in paragraph 19.

20. Admits the allegations contained in paragraph 20; however, defendant denies that, in conducting elections for municipal court judges, the County is implementing Ordinance No. 2920.

21. Denies each and every allegation contained in paragraph 21.

22. Denies each and every allegation contained in paragraph 22.

23. Denies each and every allegation contained in paragraph 23, and specifically and affirmatively alleges that "Monterey County Ordinance Nos. 2139, 2524, and 2930" have in fact been submitted to the United States Attorney General, that these ordinances have received Section 5 approval from the United States Department of Justice, and that plaintiffs have admitted these facts to this Court.

24. Lacks sufficient information or belief to answer the allegations contained in paragraph 24, and basing denial on that ground, denies each and every allegation contained therein.

25. Denies each and every allegation contained in paragraph 25.

26. Answering paragraph 26, defendant denies that the County implements the alleged ordinances in conducting elections for municipal court judges, and further denies that the alleged ordinances constitute "changes affecting voting" within the meaning of the Voting Rights Act.

27. Answering paragraph 27, admits that plaintiffs have requested the convening of a Three Judge Court to preside over this action.

28. Answering paragraph 28, repeats and incorporates by reference his answers to paragraphs 1 through 27 as if fully set forth herein.

29. Denies each and every allegation contained in paragraph 29.

30. Denies each and every allegation contained in paragraph 30.

31. Denies each and every allegation contained in paragraph 31.

32. Answering paragraph 32, admits that the statutes, regulations, codes, and/or constitutional provisions cited therein speak for themselves. The remaining allegations contained in the paragraph 32 are merely argument, requiring no response by defendants; to the extent a response is required, the State denies each and every allegation contained therein, and specifically and affirmatively alleges that the Monterey County Ordinances cited therein have in fact secured Section 5 approval from the United States Department of Justice and that plaintiffs have admitted this fact to this Court.

33. Answering paragraph 33, the State notes that the allegations contained therein appear to be merely argument, requiring no response by defendants; to the extent a response is required, the State denies each and every allegation contained therein.

AFFIRMATIVE DEFENSES

I.

The complaint is barred by the doctrine of laches.

II.

The complaint has been rendered moot by the March 6, 1995 preclearance of all relevant Monterey County

consolidation ordinances by the United States Department of Justice.

III.

The complaint has been further rendered moot by the fact that current elections of municipal court judges in Monterey County are conducted not pursuant to the Monterey County consolidation ordinances which are the subject of this action, but pursuant to superseding state statutes and provisions of the California Constitution. Plaintiffs have not alleged that these state statutes and constitutional provisions required Section 5 approval.

IV.

The complaint is barred by relevant statutes of limitations.

V.

Plaintiffs have failed to allege facts sufficient to state a claim for a race-based remedy.

VI.

No injunctive or other remedial order is appropriate in this action in light of the March 6, 1995 preclearance of all relevant Monterey County consolidation ordinances by the United States Department of Justice.

VII.

The complaint fails to state any claim against the State of California upon which relief of any sort can be granted.

WHEREFORE, defendant STATE OF CALIFORNIA respectfully prays that:

1. The complaint on file herein be dismissed with prejudice;
2. Judgment be entered against the plaintiffs and in favor of defendant State;
4. Defendant State be awarded its costs of suit incurred herein; and
5. Defendant State be awarded such other and further relief as the Court deems to be proper.

Dated: November 16, 1995

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General of California

LINDA CABATIC
Supervising Deputy
Attorney General

MANUEL M. MEDEIROS
Deputy Attorney General

/s/ Daniel G. Stone
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Deputy Attorney General

Attorneys for State of California

DECLARATION OF SERVICE

Case Name: *LOPEZ v. MONTEREY COUNTY, ET AL.*
 Case No: U.S. District Court, Northern District Case
 No. C-91-20559 REM (eai) (Three Judge
 Court)

I declare:

I am employed in the County of Sacramento, California. I
 am 18 years of age or older and not a party to the within
 entitled cause; my business address is 1300 I Street, Sacra-
 mento, California 95814.

On *November 16, 1995*, I served the attached

STATE OF CALIFORNIA'S ANSWER TO COMPLAINT

by placing a true copy thereof enclosed in a sealed enve-
 lope with postage thereon fully prepaid, in the United
 States mail at Sacramento, California, addressed as fol-
 lows:

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 Salinas, CA 93901-1513

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 County of Monterey
 240 Church Street,
 Room 214
 Salinas, CA 93902

I declare under penalty of perjury the foregoing is true
 and correct and that this declaration was executed on
November 16, 1995 at Sacramento, California.

MARGO BOX

/s/ Margo Box
 Signature

(4)

Supreme Court, U.S.

FILED

MAR 8 1996

CLERK

No. 95-1201

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

**VICKY M. LOPEZ, CRESCENCIO PADILLA,
WILLIAM A. MELENDEZ, and DAVID SERENA, *Appellants*,**

v.

**MONTEREY COUNTY, CALIFORNIA,
STATE OF CALIFORNIA, *Appellees*,**

and

STEPHEN A. SILLMAN, *Intervenor-Appellee*

**ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA**

**APPELLANTS' REPLY IN OPPOSITION
TO MOTION TO DISMISS OR AFFIRM
OF INTERVENOR-APPELLEE STEPHEN A. SILLMAN**

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11P

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
ARGUMENT	1
CONCLUSION	8

TABLE OF AUTHORITIES

Cases

<i>Clark v. Roemer</i> , 500 U.S. 646, 111 S.Ct. 2096 (1991)	3
<i>Cowgill v. California</i> , 396 U.S. 371, 90 S.Ct. 613 (1970)	4
<i>Minnick v. California Dept. of Corrections</i> , 452 U.S. 105, 101 S.Ct. 2211 (1981)	3, 4
<i>Rescue Army v. Municipal Court</i> , 331 U.S. 549, 67 S.Ct. 1409 (1947)	4
<i>Socialist Labor Party v. Gilligan</i> , 406 U.S. 583, 92 S.Ct. 1716 (1972)	3
<i>United States v. Bd. of Com'rs of Sheffield, Ala.</i> , 435 U.S. 110, 98 S.Ct. 965 (1978)	3
<i>Upham v. Seamon</i> , 456 U.S. 37, 41 - 42, 102 S.Ct. 1518, 1521 (1982)	6
<i>Wilkes County, Georgia v. United States</i> , 450 F.Supp. 1171 (D.D.C. 1978), <i>aff'd. mem.</i> , 439 U.S. 999, 99 S.Ct. 606 (1978)	6, 7

Statutes

42 U.S.C. § 1973c	<i>passim</i>
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IN THE SUPREME COURT OF THE UNITED STATES

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APPELLANTS' REPLY IN OPPOSITION
TO MOTION TO DISMISS OR AFFIRM
OF INTERVENOR-APPELLEE STEPHEN A. SILLMAN

The Motion to Dismiss or Affirm filed by Intervenor-Appellee Stephen A. Sillman contains basically the same arguments advanced by the State of California in its Motion to Dismiss or Affirm. Appellants will briefly respond to the major points addressed by Intervenor-Appellee's Motion.

The Intervenor-Appellee argues that until there is a final

resolution of the merits of this Section 5 action, 42 U.S.C. § 1973c, there should be no injunctive relief granted to enjoin the at-large judicial election. This argument discounts the primary issue involved in this appeal.

This appeal seeks to prevent the implementation of a voting change which has not received the requisite Section 5 preclearance. There can be no serious dispute that Monterey County is a jurisdiction subject to Section 5.¹ There can also be no serious dispute that the at-large method of election for municipal court judges has not been approved pursuant to Section 5.² Under applicable Section 5 precedent, the Appellants are entitled to an order preventing the implementation of the unprecleared at-large election scheme. See App. Opp. to Calif. Mot. at 2.

The fact that there are unresolved legal issues does not diminish the clearly established right of Appellants to an order enjoining the unprecleared at-large election scheme. The Intervenor-Appellee speculates that if the State prevails in its arguments that this Section 5 action may be dismissed. However, the Appellants can equally speculate that the State's arguments will not prevail. In any event, denying injunctive relief now, pending resolution of these

¹ As noted in the opposition to the State's Motion to Dismiss or Affirm, the State's contention that the designation of Monterey County as a Section 5 covered jurisdiction is susceptible to constitutional challenge is the wrong argument in the wrong court. See App. Opp. to Calif. Mot. at 5.

² Both the State of California and the Intervenor-Appellee consistently ignore that the United States Attorney General in an administrative determination dated November 13, 1995, concluded that the at-large method of electing municipal court judges has not been submitted for preclearance and thus, has not received the requisite Section 5 preclearance. Appellants' J.S. at pp. 9 - 10.

issues, would undermine the very purpose of Section 5, which seeks to shift "... the advantages of time and inertia from the perpetrators of the evil to its victims." *United States v. Bd. of Com'rs of Sheffield, Ala.*, 435 U.S. 110, 121, 98 S.Ct. 965, 974 (1978).

The Intervenor-Appellee cites several cases to support his argument that the appeal should be dismissed because the legal issues have not been fully developed in the trial court proceedings. These cases are clearly distinguishable. In *Socialist Labor Party v. Gilligan*, 406 U.S. 583, 92 S.Ct. 1716 (1972), revisions in the state's election code had rendered moot most of the challenges regarding minority party ballot access. The only remaining challenge related to a loyalty oath required of political parties. This issue had not been developed in the District Court proceedings. Moreover, since the Court had noted that members of the political party had previously signed the oath and that members had secured a place on the ballot, there was difficulty in demonstrating any injury to the political party as the record was presented to this Court. For these reasons, the appeal was dismissed even though jurisdiction was technically present.

In sharp contrast to *Socialist Labor Party*, the appeal in this Section 5 action presents a clear violation of the Voting Rights Act. The harm to the Appellants is that they will be forced to participate in an at-large judicial election which has not received Section 5 preclearance. *Clark v. Roemer*, 500 U.S. 646, 111 S.Ct. 2096 (1991). In this Section 5 action, the issue remains decidedly ripe.

Another case cited by the Intervenor-Appellee, *Minnick v. California Dept. of Corrections*, 452 U.S. 105, 101 S.Ct. 2211 (1981), involved an action filed in state court challenging the application of an affirmative action plan. Review of a state court's decision was sought by a writ of certiorari. The Court dismissed the writ because of significant developments in the law and in the facts which did not warrant this Court's review until those issues had been fully adjudicated in the trial and appellate courts.

Minnick is inapplicable to this Section 5 action. The *Minnick* Court's decision to dismiss the writ was based upon its determination that the federal question might have been affected by additional proceedings in the lower court. In contrast, no additional proceedings in the District Court here are necessary. For purposes of this appeal, there are no additional legal or factual issues to examine, since Monterey County is subject to Section 5 and the at-large election method of electing municipal court judges has not received the required Section 5 approval. Under applicable Section 5 precedent, this Court should reverse the District Court's decision to implement an unprecleared voting change.

For the same reasons articulated above, the Court's dismissal of appeals in *Cowgill v. California*, 396 U.S. 371, 90 S.Ct. 613 (1970), and in *Rescue Army v. Municipal Court*, 331 U.S. 549, 67 S.Ct. 1409 (1947) are also distinguishable. Unlike those cases, there is no need in this Section 5 action to await the construction of state laws and ordinances by state courts or to await the outcome of any state court proceedings. The Court has all the relevant facts to decide whether the District Court erred as a matter of law in implementing an unprecleared voting change contrary to this Court's Section 5 precedent.

Contrary to the assertions of Intervenor-Appellee, the reversal of the District Court's November 1, 1995, Order, will not result in the restructuring of the County's judicial system. The only consequence of a reversal of the District Court's Order is that an at-large election scheme would not be used in municipal court elections. The District Court would be free to use any other election plan so long as it complies with the standards for court-ordered election plans.³

³ There is no dispute that at a minimum, whatever benchmark is ultimately utilized, a court-ordered plan in a Section 5 action must not result in a retrogression of minority voting strength. See App. Opp. to Calif. Mot. to at p. 9.

Alternatively, the District Court could simply extend the terms of those judges elected in the June 6, 1995, precleared special election until all of the legal issues raised by the State are resolved.

The Intervenor-Appellee opposes the extension of judicial terms because he contends that the temporary judicial division plan utilized in the June 6, 1995, special election is unconstitutional. Appellants dispute this contention. First, the District Court has not made a finding of unconstitutionality. Second, the District Court did not conduct an evidentiary hearing to determine whether race was in fact the only factor incorporated in the formulation of the judicial division election plan and to determine whether the use of race-based criteria was necessary to further a compelling state interest.⁴ Absent a finding of unconstitutionality, the District Court does have the judicial discretion to extend the terms of those judges elected pursuant to the June 6, 1995, election plan until the State and Monterey County can adopt and implement a judicial election plan which meets both state constitutional and federal statutory requirements. Such an extension of terms would not disrupt the administration of justice in Monterey County.⁵

⁴ The Intervenor-Appellee states that a hearing on the constitutionality of the June 6, 1995, judicial division election plan was conducted on September 28, 1995. Intervenor-Appellee Motion to Dismiss or Affirm, at pp. 18 - 19, n. 14. The Intervenor-Appellee, however, neglects to mention that the hearing on September 28, 1995, was not an evidentiary hearing where the parties could present evidence to determine whether race was the sole factor in formulating the June 6, 1995, election plan and, if so, whether the election plan furthered a compelling state interest.

⁵ There have been no allegations that the municipal court judges elected in the June 6, 1995, cannot continue to administer justice while the District Court adjudicates all of the State's legal issues.

The Intervenor-Appellee also argues that this Section 5 action presents extreme circumstances justifying the use of an unprecleared at-large election system. The Intervenor-Appellee suggests that the District Court did not have any alternative other than to implement the unprecleared at-large election plan. The Intervenor-Appellee notes that a return to the 1968 judicial election plan is unfeasible because such a return would require a restructuring of the County's judicial system. And the extension of judicial terms of those judges elected pursuant to the June 6, 1995, election plan is not favored because of the plan's alleged unconstitutionality. Even accepting *arguendo* that the extension of judicial terms was not viable, the District Court did have a third alternative: the implementation of a court-ordered plan which fairly reflected the voting strength of the minority community, *Wilkes County, Georgia v. United States*, 450 F.Supp. 1171, 1176 (D.D.C. 1978), *aff'd. mem.*, 439 U.S. 999, 99 S.Ct. 606 (1978), and which did not result in a retrogression of minority voting strength. Since the election plan in place in 1968 consisted of judicial election districts, the fairly drawn plan would also have to consist of districts. This is so because the 1968 plan was reflective of the State's policy preferences, which are not the subject of any judicial challenge.⁶

The Intervenor-Appellee further argues that the absence of any retrogression benchmark constitutes an additional extreme circumstance justifying the use of an unprecleared at-large election plan. However, as noted above, even assuming that there is not an

⁶ In formulating a court-ordered plan, a federal court will defer to such policy preferences. *Upham v. Seamon*, 456 U.S. 37, 41 - 42, 102 S.Ct. 1518, 1521 (1982). Accordingly, the fairly drawn election plan would also have to consist of similar districts. Given the minority concentrations in Monterey County, Appellants' J.S. at pp. 3 - 4, such an election plan would contain at least two predominantly minority judicial districts. Compared to this district plan, the at-large election system must be viewed as a retrogression of minority voting strength.

appropriate benchmark, the District Court must develop the benchmark in accordance with *Wilkes County*. The fact that there has been no finding of retrogression with respect to the county ordinances is not a bar to the District Court's authority to implement a court-ordered plan which uses an election plan developed pursuant to *Wilkes County* as a benchmark. The absence of such a retrogression finding, however, is highly relevant to the issuance of injunctive relief preventing the use of an unprecleared voting change. The Intervenor-Appellee misunderstands the operation of the Section 5 preclearance provisions. Section 5 requires Monterey County and the State of California to first seek approval of changes affecting voting before these changes are implemented. The absence of a retrogression finding, in the context of this Section 5 action, clearly indicates that no Section 5 approval has been obtained. Absent such approval, the voting change must be enjoined.

In summary, all of the arguments presented by the Intervenor-Appellee do not address the clear violation of the Section 5 preclearance procedures caused by the District Court's decision to implement an unprecleared election plan. Accordingly, the Court should apply its Section 5 precedent and protect the rights of minority voters under the Voting Rights Act.

Conclusion

For the reasons stated above, the arguments presented by the Intervenor-Appellee are completely without merit. The Motion to Dismiss or Affirm filed by the Intervenor-Appellee should be denied.

Dated: March 8, 1996.

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No. 95-1201

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
ARGUMENT	1
The State's Arguments are Speculative and Irrelevant	3
A. Unresolved Issues Do Not Preclude Injunctive Relief	3
B. Unprecleared Voting Changes Constitute A Continuing Section 5 Violation	4
C. State Statutes Affecting Section 5 Covered Jurisdictions Are Subject to Preclearance	5
D. The State Cannot Challenge The County's Section 5 Designation In This Proceeding	5
E. Injunctive Relief Is The Appropriate Remedy For A Section 5 Violation	6
F. The Extreme Circumstances Exception Does Not Apply ...	7
G. Section 5 Precedent Is Controlling	8
H. Court-Ordered Plan Standards	9
CONCLUSION	10

TABLE OF AUTHORITIES

Cases

<i>Briscoe v. Bell</i> , 432 U.S. 404, 97 S.Ct. 2428 (1977)	6
<i>Brooks v. State Bd. Elections</i> , 790 F.Supp. 1156 (S.D.Ga. 1990)	3
<i>Castro v. State of California</i> , 85 Cal.Rptr. 20 (1970)	6
<i>City of Lockhart v. United States</i> , 460 U.S. 125, 103 S.Ct. 998 (1983)	9
<i>Clark v. Roemer</i> , 500 U.S. 646, 111 S.Ct. 2096 (1991)	2, 8
<i>Connor v. Waller</i> , 421 U.S. 656, 95 S.Ct. 2003 (1973)	7
<i>Dotson v. City of Indianola</i> , 514 F.Supp. 397 (D.C.Miss. 1981), <i>aff'd</i> , 456 U.S. 1002, 102 S.Ct. 2287 (1982)	4
<i>Johnson v. De Grandy</i> , ___ U.S. ___, 114 S.Ct. 2647 (1994)	5
<i>Shaw v. Reno</i> , ___ U.S. ___, 113 S.Ct. 2816 (1993)	5
<i>State of South Carolina v. Katzenbach</i> , 383 U.S. 301, 86 S.Ct. 803 (1966)	2
<i>United Jewish Organizations, Etc. v. Carey</i> , 430 U.S. 144, 97 S.Ct. 996 (1977)	5
<i>United States v. Bd. of Com'rs of Sheffield, Ala.</i> , 435 U.S. 110, 98 S.Ct. 965 (1978)	4

Table of Authorities

Cases Cont'd

<i>Upham v. Seamon</i> , 456 U.S. 37, 41 - 42, 102 S.Ct. 1518, 1521 (1982)	10
<i>Wilkes County, Georgia v. United States</i> , 450 F.Supp. 1171 (D.D.C. 1978), <i>aff'd mem.</i> , 439 U.S. 999, 99 S.Ct. 606 (1978)	9
<i>Wise v. Lipscomb</i> , 437 U.S. 535, 98 S.Ct. 2493 (1978)	9

Statutes

42 U.S.C. § 1973 b (a) (1)	6
42 U.S.C. § 1973c	<i>passim</i>

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APPELLANTS' REPLY IN OPPOSITION
TO APPELLEE STATE OF CALIFORNIA'S
MOTION TO DISMISS OR AFFIRM

The basis for the State of California's Motion to Dismiss or Affirm is that since there are several outstanding issues for the District Court to resolve, which may result in the dismissal of this action to enforce Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, the questions presented by this appeal are not substantial enough to warrant the noting of probable jurisdiction. The State contends that not all of the facts have been presented and there has not been a final

determination of Section 5 liability. Absent such a determination, the State argues, the present appeal should be dismissed. Yet these arguments are speculative and irrelevant to the issue presently before the Court.

The State's arguments discount two simple facts: 1) Monterey County is subject to the Section 5 preclearance provisions; and 2) the at-large method of electing municipal court judges has not received Section 5 approval.¹ Indeed, in arguing that injunctive relief is not appropriate "[u]nless and until the court below determines that Section 5 in fact applies here", Appellee St. of Calif. Mot. to Dismiss or Affirm. at 18 [Appellee Mot.], the State turns Section 5 on its head. For covered jurisdictions such as Monterey County, the very purpose of Section 5 is to prohibit implementation of voting changes until they have been precleared. Absent such Section 5 approval, the Court has consistently held since 1966,² that voting changes subject to the Section 5 preclearance provisions cannot be implemented in any elections. *State of South Carolina v. Katzenbach*, 383 U.S. 301, 335, 86 S.Ct. 803, 822 (1966). See also *Clark v. Roemer*, 500 U.S. 646, 652 - 653, 111 S.Ct. 2096, 2101 (1991) (§ 5 plaintiffs entitled to enjoin unprecleared voting change). Thus, the at-large system for electing municipal court judges cannot be implemented in any elections.

The District Court's November 1, 1995, Order, implementing an at-large election for municipal court judges, which has not received

¹ As noted in Appellants' Jurisdictional Statement, the implementation of a series of county ordinances resulted in the consolidation of two municipal courts and seven justice courts into one county-wide municipal court. The method of electing judges was changed from nine election districts to one at-large election, which has not received Section 5 approval. Appellants' J.S. at 6, 9 - 10.

² Appellants' J.S. at pp. 13 - 17 (listing of § 5 precedent).

Section 5 approval, is contrary to this precedent³ and thus, presents substantial questions warranting the noting of probable jurisdiction.

The State's Arguments are Speculative and Irrelevant.

The State raises several arguments in support of dismissal of this appeal or affirmance of the District Court's November 1, 1995, Order. These arguments are without substance.

A. Unresolved Issues Do Not Preclude Injunctive Relief - The State argues that an appeal of an interlocutory order where outstanding legal issues remain to be adjudicated does not present any substantial questions warranting the noting of probable jurisdiction. This argument should be rejected.

First, this argument assumes that the State will prevail in the dismissal of this Section 5 action. Such speculation cannot circumvent the Court's Section 5 precedent requiring the issuance of injunctive relief to prevent the implementation of an unprecleared voting change. The Appellants can equally speculate that the State will not succeed.

Second, there is no requirement in any of the Section 5 cases cited by the Appellants that there must be a final resolution of Section 5 liability before the issuance of injunctive relief. Such a rule would foreclose any attempts to secure temporary restraining orders or preliminary injunctions in Section 5 actions. To follow the State's proposed scheme, Section 5 relief could not become effective until all of the legal questions have been resolved by both the District Court and this Court. Clearly, such a rule would result in circumvention of Section 5 by permitting the implementation of a discriminatory voting

³ The District Court could have avoided this conflict by implementing less drastic alternatives, such as extending the judicial terms of those judges already in office. See *Brooks v. State Bd. Elections*, 790 F.Supp. 1156 (S.D.Ga. 1990).

change until there was a final adjudication by this Court. Such a rule would undermine the protections afforded by Section 5 which seeks to shift "... the advantages of time and inertia from the perpetrators of the evil to its victims." *United States v. Bd. of Com'rs of Sheffield, Ala.*, 435 U.S. 110, 121, 98 S.Ct. 965, 974 (1978).

Third, the State's arguments disregard the District Court's conclusion in the November 1, 1995, Order that there is a continuing Section 5 violation in this action. Appellants' App. 2. As a result of the District Court's previous Order of March 31, 1993, Appellants' App. 12, the judicial district county consolidation ordinances culminating in a single at-large election judicial district, cannot be implemented absent Section 5 approval. The November 1, 1995, Order, requiring at-large judicial elections, contravenes both the District Court's previous ruling and this Court's Section 5 precedent. In the face of this existing Section 5 violation, the State's speculation that it will succeed in litigating subsequent issues cannot justify implementation of an unprecleared change.

B. Unprecleared Voting Changes Constitute A Continuing Section 5 Violation - The State argues that the Appellants are guilty of laches and thus, the District Court will dismiss this Section 5 action. Appellee Mot. at pp. 3, 7 & note 8, 14. The State's laches argument cannot serve as a bar to this Section 5 action. First, the obligation to comply with Section 5 is upon Monterey County and the State, not upon the Appellants. *Dotson v. City of Indianola*, 514 F.Supp. 397, 401 (D.C.Miss. 1981), *aff'd*, 456 U.S. 1002, 102 S.Ct. 2287 (1982) ("Congress imposed upon the covered states the burden of submitting any change in voting procedures for approval in Washington, D.C., before it became effective."). Second, a violation of Section 5 occurs every time there is an election held pursuant to an unprecleared election change. *Id.* ("The duty to obtain federal approval of new voting [changes] ... is a continuing one. It arises anew each time the defendant enacts or seeks to administer an uncleared voting regulation."). The State's laches argument here is

without merit.

C. State Statutes Affecting Section 5 Covered Jurisdictions Are Subject to Preclearance - The State argues that Monterey County is conducting at-large elections for municipal court judges, not pursuant to the county ordinances, but pursuant to certain state statutes and constitutional provisions. The State further argues that there has been no ruling that these statutes and constitutional provisions are subject to Section 5. *See, e.g.*, Appellee Mot. at pp. 13 - 14, n. 18. The State also suggests that since the State is not subject to Section 5, these statutes and constitutional provisions are exempt from Section 5 approval.

Yet, applicable precedent requires the Section 5 approval of state statutes when the statutes affect Section 5 covered jurisdictions, even if the State is not a covered jurisdiction. *See e.g., Johnson v. De Grandy*, ___ U.S. ___, 114 S.Ct. 2647, 2652, n. 2 (1994) (where the State of Florida, which is not a Section 5 covered jurisdiction, submitted a legislative redistricting plan to the United States Attorney General for Section 5 approval, because five of its counties are subject to Section 5). *See also Shaw v. Reno*, ___ U.S. ___, 113 S.Ct. 2816, 2820 (1993); *United Jewish Organizations, Etc. v. Carey*, 430 U.S. 144, 148, n. 3, 97 S.Ct. 996, 1001, n. 3 (1977). This precedent exposes the State's argument as meritless.⁴

D. The State Cannot Challenge The County's Section 5 Designation In This Proceeding - The State argues that "... no court has yet considered the constitutional propriety of Monterey County's initial designation as a covered jurisdiction under Section 5." Appellee Mot. at p. 15. This argument is not only without merit, but raised in an improper forum.

⁴ Moreover, the plain language of Section 5 requires the preclearance of all changes affecting voting. No distinction is drawn between local and state changes.

The State and Monterey County cannot challenge the administrative determination which subjected the County to Section 5. *Briscoe v. Bell*, 432 U.S. 404, 97 S.Ct. 2428 (1977). The only method of exemption available to Monterey County is to file a declaratory judgment in the United States District Court for the District of Columbia seeking an exemption based upon a ten-year history of compliance with the Voting Rights Act. 42 U.S.C. § 1973 b (a) (1). Unless and until that exemption is granted, the State and the County may not unilaterally declare the provisions of Section 5 to be unenforceable.⁵

E. Injunctive Relief Is The Appropriate Remedy For A Section 5 Violation - The State argues that injunctive relief should be denied because there has been no demonstration of any harm, because of the absence of any voting discrimination attributable to Monterey County, and among other reasons,⁶ the purported elimination of the literacy

⁵ In addition, the State's interpretation of *Castro v. State of California*, 85 Cal.Rptr. 20 (1970) is in error. *Castro* only declared unconstitutional the English literacy test as it applied to persons who were literate in Spanish. The State was free to implement a literacy test as long as it was not solely in the English language. *Id.*, 85 Cal.Rptr. at 30. Thus, the State's discussion regarding its anticipation of federal policies relating to the elimination of the literacy test is equally flawed. Appellee Mot. at p. 19.

⁶ The State also contends that the population inequality of the judicial election districts in 1968 does not permit a meaningful analysis for determining whether there has been retrogression of minority voting strength. Appellee Mot. at p. 19, n. 23. Since this issue has yet to be determined by the District Court, the State opines that injunctive relief is not warranted at this time. This argument misses the mark. The relevant issue is whether there has been an implementation of an unprecleared voting change, not whether the 1968 judicial election districts are susceptible to an analysis of

test prior to Monterey County's coverage determination. Yet these reasons are simply not pertinent to either the factual or legal issues presented by this appeal. The relevant facts are relatively straightforward: Monterey County is a jurisdiction subject to Section 5; the at-large method of electing municipal court judges has not received Section 5 approval.⁷ Absent such Section 5 approval, applicable precedent requires the issuance of injunctive relief.

F. The Extreme Circumstances Exception Does Not Apply - The State argues that the unique posture of this case constitutes extreme circumstances justifying the denial of injunctive relief. Appellee Mot. at pp. 21 - 23. The State's list of such circumstances ranges from the laches argument, the absence of a final determination on a variety of issues, to the absence of any finding of voting discrimination attributable to Monterey County in determining Section 5 coverage. Space does not permit a response to each of these circumstances.⁸

retrogression of minority voting strength.

⁷ The State consistently ignores that the United States Attorney General in an administrative determination dated November 13, 1995, concluded that the at-large method of electing municipal court judges has not been submitted for preclearance and thus has not received Section 5 approval. Appellants' J.S. at pp. 9 - 10.

⁸ The recitation of these circumstances demonstrates the State's misunderstanding of the operation of Section 5. For example, the State refers to the absence of a corollary Section 2 challenge as highly significant. Under Section 2 of the Voting Rights Act, minority voters can challenge an election practice or structure because such a practice or structure denies the minority community an equal opportunity to participate in the political process and elect a candidate of its choice. 42 U.S.C. § 1973. However, under existing precedent, Appellants cannot initiate a Section 2 action against the at-large election system. According to *Connor v. Waller*, 421 U.S. 656, 95

However, such an individualized response is not necessary, since the State misunderstands the "extreme circumstances" exception specified in *Clark, supra*, 500 U.S. at 654, 111 S.Ct. at 2102.

The extreme circumstances exception relates to the practical realities in seeking to enjoin an election which is already in progress. As an election timetable progresses, there is a greater reluctance by the federal judiciary to disrupt the election. However, in Section 5 actions, such reluctance is offset by the important federal interest in complying with a statute which protects minority voting rights. Consequently, as noted by the Court, the instances where an election based upon an unprecleared voting change is permitted to go forward are very rare: "An extreme circumstance might be present if a seat's unprecleared status is not drawn to the attention of the State until the eve of the election and there are equitable principles that justify allowing the election to proceed." *Id.* As related in the Appellants' Jurisdictional Statement, there were no such extreme circumstances present which justified the implementation of an unprecleared voting change as mandated by the District Court's November 1, 1995, Order. Appellants' J.S. at pp. 18 - 25.

G. Section 5 Precedent Is Controlling - The State argues that the Section 5 precedent cited by the Appellants is distinguishable because "... the Section 5 *liability* is yet unresolved, ... the challenged ordinances were implemented long ago, and ... the passage of time has made a return to the 1968 status quo impossible." Appellee Mot. at pp. 23 - 25. These "distinctions" miss the mark.

S.Ct. 2003 (1973), until the at-large election system secures Section 5 approval, this system is deemed to be unlawful and not in effect. Consequently, one cannot initiate a Section 2 challenge to an election system which is not in effect. If the at-large judicial election system ultimately secures Section 5 approval, then an action based upon Section 2 could be commenced.

First, Appellants have already demonstrated the flaw in the State's unresolved legal issues argument. *Supra*, at 3. Second, the fact that these county ordinances were first implemented over twenty years ago is not a bar to a Section 5 enforcement action. *See City of Lockhart v. United States*, 460 U.S. 125, 129, 103 S.Ct. 998, 1001 (1983) (Court noted that a Section 5 action was instituted six years after a change affecting voting occurred).

Finally, the inability to return to the 1968 status quo should not serve to deny Appellants of their Section 5 rights. If a return to the status quo is not feasible and the covered jurisdiction cannot cure the Section 5 violation, then the federal court has the "... 'unwelcome obligation,' ... to devise and impose [an election] ... plan pending later legislative action." *Wise v. Lipscomb*, 437 U.S. 535, 540, 98 S.Ct. 2493, 2497 (1978). In fact, such action was taken by the District Court in implementing a temporary judicial division election plan for the June 6, 1995, special elections. Appellants' App. 16.

H. Court-Ordered Plan Standards - Appellants contend that court-ordered plans in Section 5 actions should follow certain standards. The State does not dispute this legal proposition. Moreover, the State does not dispute that such a federal court-ordered election plan must not result in a retrogression of minority voting strength. However, the State objects to the use of the temporary judicial division election plan utilized in the June 6, 1995, special elections as a benchmark for measuring any retrogression of minority voting strength because the plan is allegedly unconstitutional. Yet, by recognizing that the retrogression standard should be incorporated in a court-ordered plan, the State would be compelled to compare the at-large election system ordered by the November 1, 1995, District Court Order with another election plan. If no plan is available, then the District Court would compare the at-large election system with an election district plan which fairly reflects the voting strength of the minority voting community. *Wilkes County, Georgia v. United States*, 450 F.Supp. 1171, 1176 (D.D.C. 1978), *aff'd. mem.*, 439 U.S. 999, 99 S.Ct. 606

(1978). Such a plan would demonstrate that the at-large election plan results in a retrogression of minority voting strength.⁹

Conclusion

The State's arguments are completely without merit. For these reasons, the Appellee's Motion to Dismiss or Affirm should be denied.

Dated: March 8, 1996.

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⁹ The judicial election plan in place in 1968 consisted of election districts. At the time, judicial election districts in Monterey County were reflective of the State's policy preferences, which are not the subject of any judicial challenge. In formulating a court-ordered plan, a federal court will defer to such policy preferences. *Upham v. Seamon*, 456 U.S. 37, 41 - 42, 102 S.Ct. 1518, 1521 (1982). Accordingly, the fairly drawn election plan would also have to consist of similar districts. Given the minority concentrations in Monterey County, Appellants' J.S. at pp. 3 - 4, such an election plan would contain at least two predominantly minority judicial districts. Compared to this district plan, the at-large election system must be viewed as a retrogression of minority voting strength.

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No. 95-1201

Supreme Court, U.S.

FILED

MAY 18 1996

CLERK

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

VICKY M. LOPEZ, CRESCENCIO PADILLA,
WILLIAM A. MELENDEZ, and DAVID SERENA,
Appellants,

v.

MONTEREY COUNTY, CALIFORNIA,
STATE OF CALIFORNIA, *Appellees,*
and
STEPHEN A. SILLMAN, *Intervenor-Appellee*

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT
OF CALIFORNIA

JOINT APPENDIX

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Appeal Docketed January 29, 1996
Probable Jurisdiction Noted April 1, 1996

193 PP

Table of Contents*

1.	Table of Contents	i
2.	List of Relevant Docket Entries ..	Joint Appendix - 1
3.	Complaint (Docket Entry No. 1) (9/6/91)	Joint Appendix - 27
4.	Answer by defendant Monterey County (Docket Entry No. 6) (10/28/91)	Joint Appendix - 36
5.	Temporary Restraining Order (Docket Entry No. 13) (1/9/92)	Joint Appendix - 42
6.	Order by Judge Ronald M. Whyte -[Plaintiffs' request for three judge court](Docket Entry No. 20) (6/24/92)	Joint Appendix - 45
7.	Order by Judge Ronald M. Whyte denying motion for summary judgment, granting motion for summary judgment, Status conference set for 9/3/93 (Docket Entry No. 39) (4/1/93)	Joint Appendix - 47
8.	Stipulated Dismissal of <i>Monterey County v. United States</i> , Civil Action No. 93-1639 (CRR, SSH, KLH (U.S.C.A.)) (D.D.C.) (Filed 10/7/93). Intervenor-Appellee Stephen A. Sillman, Motion to Dismiss or Affirm, Appendix 1a	
9.	Parties (Plaintiffs and Defendant Monterey County)	

* Documents designated and included in the Joint Appendix have not been modified to correct typographical and other types of errors.

Table of Contents
Cont'd

	Stipulation and Court Order (No Docket Entry No.) (Received by Court 11/22/93)	
	Intervenor-Appellee Stephen A. Sillman, Motion to Dismiss or Affirm, Appendix 3a	
10.	Objections of the State of California to stipulation and Order (Docket Entry No. 43) (12/7/93)	Joint Appendix - 60
11.	Order by Judge Ronald M. Whyte Status conference set for 1/14/94; Case stayed as to 1/18/94 (Docket Entry No. 51) (12/22/93)	Joint Appendix - 69
12.	Parties (Plaintiffs and Defendant Monterey County) Second Stipulation and Court Order (No Docket Entry No.) (1/13/94).	Intervenor-Appellee Stephen A. Sillman, Motion to Dismiss or Affirm, Appendix 11a
13.	Order by Judge Ronald M. Whyte denying motion to intervene, denying motion for limited to intervene. Deadline for additional points supporting the new proposal due by 1/18/94; responses due by 1/28/94; reply filed by 2/4/94 (Docket Entry No. 57) (1/21/94)	Joint Appendix - 71
14.	Objections of the State of California to 2nd stipulation and proposed order (Docket Entry No. 62) (1/28/94)	Joint Appendix - 76
15.	Order by Judge Ronald M. Whyte scheduling hearing re: second stipulation and proposed order for 2/25/94	

Table of Contents
Cont'd

	(Docket Entry No. 73) (2/23/94)	Joint Appendix - 86
16.	Order by Judge Whyte for an order requiring submission of election plan for preclearance; alternative order to show cause & for an order enjoining election pending preclearance (Docket Entry No. 75) (3/1/94)	Joint Appendix - 88
17.	Stipulation (Plaintiffs and Defendant Monterey County) for hearing to show cause before three judge panel on 3/31/94 at 1:30 p.m. (Docket Entry No. 77) (3/16/94) & Plan 7B & 1968 Judicial Districts.	Appellants' Jurisdictional Statement Appendix 92 (Stipulations); Appellants' Jurisdictional Statement Appendix 88 (Plan 7B); Appellee State of California, Motion to Dismiss or Affirm, Appendix 14a (1968 Judicial Districts)
18.	Response of the State of California to Stipulations of Plaintiffs' and Monterey County for hearing on order to show cause (Docket Entry No. 83) (3/29/94)	Joint Appendix - 93
19.	Tentative Order by Judge Ronald M. Whyte Requiring county to hold November elections pursuant to an interim plan and denying motion to vacate judicial appointment or shorten terms except to the extent that the court by this order has determined that the terms of those elected in November should be shortened. Objection to this ruling filed by 5/13/94. Matter submitted as of that date. (Docket Entry No. 91) (5/3/94)	

Table of Contents
Cont'd

.....	Joint Appendix - 96
20. Order by Judge Ronald M. Whyte granting motion for leave to participate as amicus curiae, enjoining election pending preclearance, denying motion to vacate judicial appointment (Docket Entry No. 105) (6/2/94)	..... Joint Appendix - 103
21. Supplement by Intervenor-Defendant State of California, memo (Docket Entry No. 111) (11/14/94)	..... Joint Appendix - 111
22. Order by Judge Ronald M. Whyte enjoining elections pending preclearance of permanent plan except for court-ordered special election in 1995 (Docket Entry No. 115) (12/20/94)	..... Joint Appendix - 123
23. Order by Judge Ronald M. Whyte to clarify order dated 12/20/94 (Docket Entry No. 118) (1/10/95)	..... Joint Appendix - 138
24. Notice by defendant Monterey County 2nd notice re: election schedule proposed by Monterey County ¹ (Docket Entry No. 119) (1/10/95)	..... Joint Appendix - 139
25. Order by Judge Ronald M. Whyte dismissing party Michael S. Fields (Docket Entry No. 120) (1/18/95)	

¹ Docket Entry No. 119 is incorrectly designated as a document filed by Monterey County. The correct designation should be the Plaintiffs.

Table of Contents
Cont'd

.....	Joint Appendix - 142
26. Declaration of Honorable Stephen A. Sillman on behalf of Intervenor Stephen A. Sillman re motion to intervene (Docket Entry No. 125) (3/10/95)	..... Joint Appendix - 143
27. Request for modification of December 20, 1994 and January 10, 1995 orders by Intervenor Stephen A. Sillman (Docket Entry No. 126) (3/10/95)	..... Joint Appendix - 154
28. Order by Judge Ronald M. Whyte granting motion for modification of 12/20/94, and 01/10/95, court orders; and opposition to request of Stephen A. Sillman for intervention, denying motion to intervene (Docket Entry No. 141) (4/13/95)	..... Joint Appendix - 160
29. Order by Judge Ronald M. Whyte - The parties are hereby requested to brief the effect of Miller v. Johnson, 95 Daily Journal D.A.R. 8495 on this case in their status conference statements for the Status Conference set for 9/28/95 (Docket Entry No. 150) (9/7/95)	..... Joint Appendix - 163
30. Order by Judge Ronald M. Whyte request for amicus curiae brief from United States (Docket Entry No. 159) (10/3/95)	..... Joint Appendix - 164
31. State of California Letter to District Court, dated September 29, 1995 (Docket Entry No. 160) (10/3/95)	.. Appellee State of California, Motion to Dismiss or

Table of Contents
Cont'd

	Affirm, Appendix 16a	
32.	Excerpts of Transcript, September 28, 1995, Status Conference (Docket Entry No. 161) (10/4/95)	
	. Appellants' Jurisdictional Statement Appendix 109;	
	Appellee State of California, Motion to Dismiss or Affirm, Appendix 11a; Intervenor-Appellee Stephen A. Sillman, Motion to Dismiss or Affirm, Appendix 42a	
33.	Order by Judge Ronald M. Whyte modifying injunction (Docket Entry No. 166) (11/1/95)	
	. . . . . Joint Appendix - 165	
34.	Answer by Intervenor-Defendant State of California to complaint (Docket Entry No. 169) (11/20/95)	
	. . . . . Joint Appendix - 174	
35.	Order clarifying order modifying injunction by Judge Ronald M. Whyte (Docket Entry No. 172) (11/20/95)	
	. . . . . Joint Appendix - 180	
36.	Order approving resolution and modified election schedule by Judge Ronald M. Whyte (Docket Entry No. 173) (11/21/95)	
	. . . . . Joint Appendix - 182	
37.	Declaration by Joaquin G. Avila on behalf of Plaintiff re motion for reconsideration and modification of the court's 11/01/95, order modifying injunction (Docket Entry No. 178) (11/29/95) (only designating Administrative Ruling (including attachments) from the United States Attorney General dated 11/13/95)	
	. . Appellants' Jurisdictional Statement, Appendix 28	

Table of Contents
Cont'd

38.	Order by Judge James Ware denying motion for reconsideration and modification of the court's 11/01/95, order modifying injunction (Docket Entry No. 179) (11/30/95)	Joint Appendix - 184
39.	Notice of Appeal by Plaintiff David Serena, Plaintiff William A. Melendez, Plaintiff Crescencio Padilla, Plaintiff Vicky M. Lopez from Dist. Court decision Scheduling order modifying injunction, order - Fees status paid (Docket Entry No. 189) (11/30/95)	
	. . Appellants' Jurisdictional Statement Appendix 26	
40.	Order by Judge Ronald M. Whyte denying motion to stay of order modifying injunction entered on 11/09/95, pending appeal (Docket Entry No. 187) (1/2/96)	
	. . . . . Joint Appendix - 185	
41.	Plaintiffs' Notice Regarding Continuing District Court's Jurisdiction (Docket Entry No. 190 (2/12/96) ²	
	. . Intervenor-Appellee Stephen A. Sillman, Motion to Dismiss or Affirm, Appendix 44a	

² Filing of document occurred after Notice of Appeal was filed.

Joint Appendix - 1

Relevant Docket Entries for <i>Lopez, et al. v. Monterey County, et al.</i> , Supreme Court Docket No. 95-1201		
Date	Doc. No.	Description *(Part of Court Record - Not on Docket Sheet)
09/06/91	1	"COMPLAINT (Summons (es) issued) (referred to Magistrate Judge Edward A. Infante) (cv) [Entry date 09/09/91]"
10/28/91	6	"ANSWER by defendant Monterey County to complaint [1-1] (cv) [Entry date 10/30/91]"
01/09/92	13	"TEMPORARY RESTRAINING ORDER by Judge William A. Ingram [7-1]; order to show cause ddl 2/10/92 (cc: all counsel) (cv) [Entry date 01/10/92]"
06/24/92	20	"ORDER by Judge Ronald M. Whyte Plaintiffs have requested for three judge panel on 5/11/92 the court issued a tentative decision, denying plaintiff's Request of a 3 judge court. Court has read and considered both parties brief and concludes that its tentative decision is wrong and that plaintiff's request is in fact meritorious. The court hereby notifies the Chief Judge of the Circuit of the circuit of plaintiff request for the convening of a three judge court. request for a three judge court. (Date Entered: 6/26/92) [Edit date 09/28/92]"
08/20/92	21	"ORDER by Judge Ronald M. Whyte; Status conference set for 10:30 10/9/92 (Date Entered: 8/21/92) (cc: all counsel) (cv) [Entry date 08/21/92]"

Joint Appendix - 2

Relevant Docket Entries for <i>Lopez, et al. v. Monterey County, et al.</i> , Supreme Court Docket No. 95-1201		
Date	Doc. No.	Description *(Part of Court Record - Not on Docket Sheet)
09/28/92	22	"JOINT STATUS CONFERENCE STATEMENT by plaintiff David Serena, defendant Monterey County (cv) [Entry date 09/29/92]"
10/09/92	23	"MOTION by plaintiff Vicky M. Lopez for summary judgment with Notice set for to be announced (cv)"
10/09/92	24	"MEMORANDUM BY plaintiff Vicky M. Lopez in support for motion for summary judgment [23-1] (cv)"
10/09/92	25	"DECLARATION by Joaguin G. Avila on behalf of plaintiff Vicky M. Lopez re motion for summary judgment [23-1] (cv)"
10/09/92	26	"MOTION by defendant Monterey County to dismiss for failure to join an indispensable party, or in the second alternative, for for summary judgment with Notice set for to be set (cv)"
10/09/92	27	"MEMORANDUM by defendant Monterey County in support of motion to dismiss for failure to join an indispensable party [26-1], of motion for summary judgment [26-2] (cv)"
10/09/92	28	"DECLARATION by Mary A. Wallace on behalf of defendant Monterey County re motion to dismiss for failure to join an indispensable party [26-1] (cv)"

Joint Appendix - 3

Relevant Docket Entries for <i>Lopez, et al. v. Monterey County, et al.</i> , Supreme Court Docket No. 95-1201		
Date	Doc. No.	Description *(Part of Court Record - Not on Docket Sheet)
10/09/92	29	"DECLARATION by I.L. Hollingsworth on behalf of defendant Monterey (cv)"
10/09/92	30	"DECLARATION by Bradley J. Clark on behalf of defendant Monterey County re motion to dismiss for failure to join an indispensable party [26-1], re motion for summary judgment [26-2] (cv)"
10/09/92	31	"Minutes: (C/R Shelly Coffey); Status conference held (cv) [Entry date 10/15/92]"
10/23/92	32	"OPPOSITION by plaintiff Vicky M. Lopez to motion to dismiss for failure to join an indispensable party [26-1], motion for summary judgment [26-2] (cv) [Entry date 10/26/92]"
10/23/92	33	"OPPOSITION by defendant Monterey County to motion for summary judgment [23-1] (cv) [Entry date 10/27/92]"
10/23/92	34	"ORDER by Judge Ronald M. Whyte setting hearing on motion to dismiss for failure to join an indispensable party [26-1] 1:30 12/17/92, setting hearing on motion for summary judgment [26-2] 1:30 12/17/92, setting hearing on motion for summary judgment [23-1] 1:30 12/17/92 will be heard by the three judge panel

Joint Appendix - 4

Relevant Docket Entries for <i>Lopez, et al. v. Monterey County, et al.</i> , Supreme Court Docket No. 95-1201		
Date	Doc. No.	Description *(Part of Court Record - Not on Docket Sheet)
10/23/92 Cont'd	34	of Judge Ronald M. Whyte (Date Entered: 10/28/92) (cc: all counsel) (cv) [Entry date 10/28/92]"
10/28/92	35	"REPLY filed by plaintiff's re opposition [33-1] (cv)"
10/30/92	36	"REPLY by defendant Monterey County re opposition [32-1] (cv) [Entry date 11/02/92]"
01/05/93	37	"MINUTES: (C/R Shelly Coffey) that the motion to dismiss for failure to join an indispensable party [26-1] is submitted, that the motion for summary judgment [26-2] is submitted, that the motion for summary judgment [23-1] is submitted for three judge panel of Judge Ronald M. Whyte and Judge James Ware and Judge Schroeder (cv) [Entry date 1/13/93]"
02/10/93	38	"REPORTER'S TRANSCRIPT; Date of proceedings: 1/5/93 (C/R: Shelly Coffey) (cv)"
04/01/93	39	"ORDER by Judge Ronald M. Whyte denying motion for summary judgment [26-2], granting motion for summary judgment [23-1] Status conference set for 10:30 9/3/93; (Date Entered: 4/7/93) (cc: all counsel) (cv) [Entry date 04/07/93]"

Joint Appendix - 5

Relevant Docket Entries for <i>Lopez, et al. v. Monterey County, et al.</i> , Supreme Court Docket No. 95-1201		
Date	Doc. No.	Description *(Part of Court Record - Not on Docket Sheet)
09/03/93	40	"MINUTES: (C/R Shelly Coffey) Case Management Conference set for 10:30 3/4/94; (cv) [Entry date 09/15/93]"
09/03/93	*	"STIPULATION REGARDING INJUNCTION AND CONTINUING JURISDICTION"
11/22/93	*	"PARTIES STIPULATION AND COURT ORDER"
12/03/93	41	"ORDER by Judge Ronald M. Whyte The State of California motion to intervene filed by 12/7/93; Opposition filed by 12/14/93; Briefs filed by 12/14/93; (Date Entered: 12/7/93) (cc: all counsel) [5:91-cv-20559] (cv) [Entry date 12/07/93]"
12/07/93	42	"MOTION before Judge Ronald M. Whyte for limited to intervene [5:91-cv-20559] (cv) [Entry date 12/08/93]"
12/07/93	43	"OBJECTIONS to stipulation and order [5:91-cv-20559] (cv) [Entry date 12/08/93]"
12/10/93	45	"LETTER dated 12/7/93 from Manuel M. Medeiros [5:91-cv-20559] (cv) [Entry date 12/14/93]"
12/14/93	46	"RESPONSE by defendant, plaintiff re order [41-1] [5:91-cv-20559] (cv)"

Joint Appendix - 6

Relevant Docket Entries for <i>Lopez, et al. v. Monterey County, et al.</i> , Supreme Court Docket No. 95-1201		
Date	Doc. No.	Description *(Part of Court Record - Not on Docket Sheet)
12/22/93	51	"ORDER by Judge Ronald M. Whyte Status conference set for 10:30 1/14/94,, Case stayed as to 1/18/94 (Date Entered: 12/27/93) (cc: all counsel) [5:91-cv-20559] (cv) [Entry date 12/27/93]"
01/13/94	*	"PARTIES SECOND STIPULATION AND COURT ORDER"
01/13/94	53	"MEMORANDUM by plaintiff Vicky M. Lopez in support of 2nd stip & order. [5:91-cv-20559] (cv) [Entry date 01/14/94]"
01/14/94	54	"MINUTES: (C/R Jo Ann Bryce) INITIAL CASE MANAGEMENT CONFERENCE HELD. Court will issue order re: panel [5:91-cv-20559] (cv) [Entry date 01/19/94]"
01/18/94	55	"MEMORANDUM by plaintiff David Serena in support of 2nd stipulation & order [5:91-cv-20559] (cv) [Entry date 01/19/94]"
01/20/94	56	"MEMORANDUM by defendant Monterey County in support of 2nd stipulation and order [5:91-cv-20559] (cv)"
01/21/94	57	"ORDER by Judge Ronald M. Whyte denying motion to intervene [49-1], denying motion for limited to intervene [42-1] Deadline for additional points supporting the new proposal due by 1/18/94; responses due by 1/28/94;

Joint Appendix - 7

Relevant Docket Entries for <i>Lopez, et al. v. Monterey County, et al.</i> , Supreme Court Docket No. 95-1201		
Date	Doc. No.	Description *(Part of Court Record - Not on Docket Sheet)
01/21/94 Cont'd	57	reply filed by 2/4/94. (Date Entered: 1/26/94) (cc: all counsel) [5:91-cv-20559] (cv) [Entry date 01/26/94]"
01/28/94	62	"OBJECTIONS to 2nd stipulation and proposed order [5:91-cv-20559] (cv) [Entry date 01/31/94]"
01/28/94	69	"MOTION for leave to file brief Amicus Curiae and brief of the Governor of the State of California as Amicus Curiae [5:91-cv-20559] (cv) [Entry date 02/16/94]"
01/31/94	63	"ADDENDUM filed to objection [62-1] [5:91-cv-20559] (cv) [Entry date 02/01/94]"
02/04/94	64	"REPLY by plaintiff Vicky M. Lopez re opposition [59-1] [5:91-cv-20559] (cv) [Entry date 02/07/94]"
02/04/94	65	"REPLY by plaintiff Vicky M. Lopez re objection [62-1] [5:91-cv-20559] (cv) [Entry date 02/07/94]"
02/04/94	66	"RESPONSE by defendant Monterey County re objection [62-1] [5:91-cv-20559] (cv) [Entry date 02/07/94]"
02/04/94	67	"RESPONSE by defendant Monterey County re motion to intervene [58-1] [5:91-cv-20559] (cv) [Entry date 02/07/94]"

Joint Appendix - 8

Relevant Docket Entries for <i>Lopez, et al. v. Monterey County, et al.</i> , Supreme Court Docket No. 95-1201		
Date	Doc. No.	Description *(Part of Court Record - Not on Docket Sheet)
02/04/94	68	"RESPONSE by defendant Monterey County to filing of Governor's Amicus curiae brief. [5:91-cv-20559] (cv) [Entry date 02/07/94]"
02/22/94	70	"MOTION by plaintiff David Serena to vacate judicial appointment, or in the alternative, for order to shorten the terms of certain judicial appointments to the Monterey County Municipal Court District. [5:91-cv-20559] (cv)"
02/23/94	73	"ORDER by Judge Ronald M. Whyte scheduling hearing re: second stipulation and proposed order for 2/25/94 at 2:30 pm () (cc: all counsel) [5:91-cv-20559] (kk) [Entry date 02/28/94]"
02/25/94	74	"MINUTES: of Judge Whyte (C/R Shelly Coffey) three judge court hearing re: stipulation & order-held [5:91-cv-20559] (mh) [Entry date 03/02/94]"
03/01/94	75	"ORDER by Judge Whyte for an order requiring submission of election plan for preclearance; alternative order to show cause & for an order enjoining election pending preclearance [SEE DOCUMENT FOR DETAILS] (Date Entered: 3/9/94) (cc: all counsel) [5:91-cv-20559] (mh) [Entry date 03/09/94]"

Joint Appendix - 9

Relevant Docket Entries for <i>Lopez, et al. v. Monterey County, et al.</i> , Supreme Court Docket No. 95-1201		
Date	Doc. No.	Description *(Part of Court Record - Not on Docket Sheet)
03/07/94	76	"ORDER by Judge Ronald M. Whyte setting hearing on motion to vacate judicial appointment [70-1] 1:30 3/31/94, setting hearing on motion for order to shorten the terms of certain judicial appointments to the Monterey County Municipal Court District. [70-2] 1:30 3/31/94; Opposition filed by 3/16/94; reply filed by 3/23/94 (Date Entered: 3/11/94) (cc: all counsel) [5:91-cv-20559] (cv) [Entry date 03/11/94]"
03/15/94	*	"RESPONSE OF INTERVENOR STATE TO MOTION OF PLAINTIFFS TO VACATE JUDICIAL APPOINTMENTS OR TO SHORTEN TERMS"
03/16/94	77	"STIPULATION for hearing to show cause before three judge panel on 3/31/94 at 1:30 p.m. [5:91-cv-20559] (jv) [Entry date 03/17/94]"
03/16/94	78	"DECLARATION by Douglas C. Holland on behalf of defendant Monterey County re stipulation [77-1] [5:91-cv-20559] (jv) [Entry date 03/17/94]"
03/25/94	84	"MOTION by intervenor Michael S. Fields for leave to file brief Amicus Curiae and request to be placed on the mailing list, proposed brief attached. [5:91-cv-20559] (cv) [Entry date 03/31/94]"

Relevant Docket Entries for <i>Lopez, et al. v. Monterey County, et al.</i> , Supreme Court Docket No. 95-1201		
Date	Doc. No.	Description *(Part of Court Record - Not on Docket Sheet)
3/25/94	--	"RECEIVED Brief Amicus Curiae and exhibits submitted by intervenor Michael S. Fields [5:91-cv-20559] (cv) [Entry date 03/31/94]"
03/25/94	85	"EXHIBITS re document received [0-0] [5:91-cv-20559] (cv) [Entry date 03/31/94]"
03/29/94	83	"RESPONSE of the State of Calif to Stipulations of Plaintiffs' and Monterey County for hearing on order to show cause. [5:91-cv-20559] (cv)"
04/07/94	86	"LETTER dated 4/4/94 from T.A. Quinn re: 4 letters [5:91-cv-20559] (cv) [Entry date 4/11/94]"
04/25/94	90	"LETTER dated 4/20/94 from T. Anthony Quinn re: boundary limits and response to 4/14/94 memorandum [5:91-cv-20559] (kk) [Entry date 04/26/94]"
05/03/94	91	"TENTATIVE ORDER by Judge Ronald M. Whyte Requiring county to hold November elections pursuant to an interim plan and denying motion to vacate judicial appointment or shorten terms except to the extent that the court by this order has determined that the terms of those elected in November should be shorted. Objection to this ruling filed by

Relevant Docket Entries for <i>Lopez, et al. v. Monterey County, et al.</i> , Supreme Court Docket No. 95-1201		
Date	Doc. No.	Description *(Part of Court Record - Not on Docket Sheet)
05/03/94 Cont'd	91	5/13/94. Matter submitted as of that date. [70-1] (Date Entered: 5/6/94) (cc: all counsel) [5:91-cv-20559] (cv) [Entry date 05/06/94]"
05/13/94	94	"OBJECTIONS by plaintiff David Serena, plaintiff Jesse G. Sanchez, plaintiff William A. Melendez, plaintiff Crescencio Padilla, plaintiff Vicky M. Lopez to order [91-1] [5:91-cv-20559] (cv)"
05/13/94	95	"RESPONSE by defendant Monterey County re order [91-1] [5:91-cv-20559] (cv)"
05/13/94	96	"MOTION by intervenor-defendant California, ³ State of for leave to to participate as amicus curiae [5:91-cv-20559] (cv) [Entry date 05/16/94]"
05/13/94	97	"MEMORANDUM by intervenor-defendant California, ⁴ State of in support of motion for leave to to participate as amicus curiae [96-1] [5:91-cv-20559] (cv) [Entry date 05/16/94]"

³ Docket Entry No. 96 is incorrectly designated as a document filed by the State of California. The correct designation should be the United States.

⁴ Docket Entry No. 97 is incorrectly designated as a document filed by the State of California. The correct designation should be the United States.

Joint Appendix - 12

Relevant Docket Entries for <i>Lopez, et al. v. Monterey County, et al.</i> , Supreme Court Docket No. 95-1201		
Date	Doc. No.	Description *(Part of Court Record - Not on Docket Sheet)
05/13/94	98	"BRIEF FILED by intervenor-defendant California, ⁵ State of regarding motion for leave to to participate as amicus curiae [96-1] [5:91-cv-20559] (cv) [Entry date 05/16/94]"
05/13/94	--	"RECEIVED submitted by intervenor-defendant California, State of re: [96-1] [5:91-cv-20559] (cv) [Entry date 05/16/94]"
05/19/94	99	"ORDER by Judge Ronald M. Whyte re response to Amicus brief [98-1] should do so by 5/20/94. (Date Entered: 5/19/94) (cc: all counsel) [5:91-cv-20559] (cv)"
05/24/94	103	"LETTER date 5/18/94 from T. Anthony Quinn Re: amicus curiae brief [5:91-cv-20559] (cv) [Entry date 05/25/94]"
06/02/94	105	"ORDER by Judge Ronald M. Whyte granting motion for leave to to participate as amicus curiae [96-1], denying motion to vacate judicial appointment [70-1] (Date Entered: 6/8/94) (cc: all counsel) [5:91-cv-20559] (cv) [Entry date 06/08/94]"

⁵ Docket Entry No. 98 is incorrectly designated as a document filed by the State of California. The correct designation should be the United States.

Joint Appendix - 13

Relevant Docket Entries for <i>Lopez, et al. v. Monterey County, et al.</i> , Supreme Court Docket No. 95-1201		
Date	Doc. No.	Description *(Part of Court Record - Not on Docket Sheet)
07/07/94	107	"REPORTER'S TRANSCRIPT; Date of proceedings: 3/31/94 (C/R: Shelly Coffey) [5:91-cv-20559] (cv)"
11/03/94	108	"MINUTES: (C/R Shelly Coffey) for three judge panel of Judge Ronald M. Whyte and Judge James Ware and Judge Mary Schroeder. Briefs to be submitted by 11/11/94. [5:91-cv-20559] (cv) [Entry date 11/09/94]"
11/10/94	109	"MEMORANDUM by Plaintiff David Serena post 11/3/94 hearing [5:91-cv-20559] (cv)"
11/14/94	111	"SUPPLEMENT by Intervenor-Defendant California, State of memo [5:91-cv-20559] (cv) [Entry date 11/16/94]"
11/14/94	112	"BRIEF FILED by the US responding to Equal Protection Claims raised by defendant-Intervenor State of California [5:91-cv-20559] (cv) [Entry date 11/16/94]"
11/15/94	113	"BRIEF FILED by defendant Monterey County responding to Equal Protection claims raised by defendant-Intervenor State of California. [5:91-cv-20559] (cv) [Entry date 11/16/94]"
12/15/94	114	"NOTICE of recent decision [5:91-cv-20559] (cv) [Entry date 12/19/94]"

Joint Appendix - 14

Relevant Docket Entries for <i>Lopez, et al. v. Monterey County, et al.</i> , Supreme Court Docket No. 95-1201		
Date	Doc. No.	Description *(Part of Court Record - Not on Docket Sheet)
12/20/94	115	"ORDER by Judge Ronald M. Whyte enjoining elections pending preclearance of permanent plan except for court-ordered special election in 1995 (Date Entered: 12/22/94) (cc: all counsel) [5:91-cv-20559] (cv) [Entry date 12/22/94]"
12/22/94	*	Letter from Douglas C. Holland to Three Judge Court
01/06/95	*	Letter from Douglas C. Holland to Three Judge Court
01/07/95	*	"PLAINTIFFS' SECOND NOTICE REGARDING ELECTION SCHEDULE PROPOSED BY MONTEREY COUNTY"
01/10/95	118	"ORDER by Judge Ronald M. Whyte to clarify order dated 12/20/94 (Date Entered: 1/11/95) (cc: all counsel) [5:91-cv-20559] (cv) [Entry date 01/11/95]"
01/10/95	119	"NOTICE by defendant Monterey County 2nd notice re: election schedule proposed by Monterey County [5:91-cv-20559] (cv) [Entry date 01/11/95]" ⁶

⁶ Docket Entry No. 119 is incorrectly designated as a document filed by Monterey County. The correct designation should be the Plaintiffs.

Joint Appendix - 15

Relevant Docket Entries for <i>Lopez, et al. v. Monterey County, et al.</i> , Supreme Court Docket No. 95-1201		
Date	Doc. No.	Description *(Part of Court Record - Not on Docket Sheet)
01/18/95	120	"ORDER by Judge Ronald M. Whyte dismissing party Michael S. Fields [58-1] (Date Entered: 01/27/95) (cc: all counsel) [5:91-cv-20559] (gm) [Entry date 01/27/95]"
02/15/95	121	"LETTER dated 02/13/95 from Joaquin G. Avila, Barbara Y. Phillips, Douglas Holland, William F. Murphy [5:91-cv-20559] (gm) [Entry date 02/21/95]"
03/08/95	122	"NOTICE or recent determination by the United States under section 5 of the voting rights act. [5:91-cv-20559] (gm) [Entry date 03/30/95]"
03/10/95	123	"MOTION-Request of Stephen A. Sillman, Presiding Judge of the Monterey County Municipal Court for limited intervention in his official capacity as presiding Judge before Judge Ronald M. Whyte to intervene [5:91-cv-20559] (gm) [Entry date 04/03/95]"
03/10/95	124	"MEMORANDUM of points and authorities by Intervenor Stephen A. Sillman in support of motion to intervene [123-1] [5:91-cv-20559] (gm) [Entry date 04/03/95]"
03/10/95	125	"DECLARATION of Honorable Stephen A. Sillman on behalf of Intervenor Stephen A. Sillman re motion to intervene [123-1] [5:91-cv-20559] (gm) [Entry date 04/03/95]"

Relevant Docket Entries for <i>Lopez, et al. v. Monterey County, et al.</i> , Supreme Court Docket No. 95-1201		
Date	Doc. No.	Description *(Part of Court Record - Not on Docket Sheet)
03/10/95	126	"REQUEST for modification of December 20, 1994 and January 10, 1995 orders by Intervenor Stephen A. Sillman for [5:91-cv-20559] (gm) [Entry date 04/03/95]"
03/10/95	127	"PROOF OF SERVICE by Intervenor Stephen A. Sillman of documents from 123 to 126 [5:91-cv-20559] (gm) [Entry date 04/03/95]"
03/21/95	128	"ORDER the court hereby requests that any party wishing to respond to Judge Sillman's motion to intervene in his official capacity as presiding judge, do so by 3/29/95 by Judge Ronald M. Whyte (Date Entered: 04/04/95) (cc: all counsel) [5:91-cv-20559] (gm) [Entry date 04/04/95]"
03/22/95	*	Letter from Marguerite Mary Leoni to Three Judge Court
03/27/95	129	"STATEMENT of non-opposition to proposed intervention of presiding judge Sillman and to proposed modification of election order by Intervenor-Defendant California, State of [5:91-cv-20559] (gm) [Entry date 04/04/95] [Edit date 04/04/95]"
03/29/95	133	"RESPONSE by Plaintiff David Serena, Plaintiff Jesse G. Sanchez, Plaintiff William A. Melendez, Plaintiff Crescencio Padilla, Plaintiff Vicky M. Lopez re order setting deadline to

Relevant Docket Entries for <i>Lopez, et al. v. Monterey County, et al.</i> , Supreme Court Docket No. 95-1201		
Date	Doc. No.	Description *(Part of Court Record - Not on Docket Sheet)
03/29/95 Cont'd	133	respond to motion to intervene [128-1] [5:91-cv-20559] (gm) [Entry date 04/07/95]"
03/30/95	134	"ORDER by Judge Ronald M. Whyte the court has reviewed the above-entitled request for extension and good cause appearing, it is hereby ordered that the time for the defendant Monterey county, California to file its opposition to the motion for intervention filed by Judge Stephen Sillman is extended to 03/31/95 answer Date Entered: 04/10/95) (cc: all counsel) [5:91-cv-20559] (gm) [Entry date 04/10/95]"
03/31/95	135	"MOTION before Judge Ronald M. Whyte by defendant Monterey County for modification of 12/20/94, and 01/10/95, court orders; and opposition to request of Stephen A. Sillman for intervention [5:91-cv-20559] (gm) [Entry date 04/10/95]"
04/03/95	136	"United States RESPONSE re motion for modification of 12/20/94, and 01/10/95, court orders; and opposition to request of Stephen A. Sillman for intervention [135-1] [5:91-cv-20559] (gm) [Entry date 04/10/95]"
04/06/95	138	"OBJECTIONS by Amicus Curiae Alan Hedegard to Monterey County's proposal to grant 6 year terms of office to the winners of

Joint Appendix - 18

Relevant Docket Entries for <i>Lopez, et al. v. Monterey County, et al.</i> , Supreme Court Docket No. 95-1201		
Date	Doc. No.	Description *(Part of Court Record - Not on Docket Sheet)
04/06/95 Cont'd	138	the 1995 special elections [5:91-cv-20559] (gm) [Entry date 04/10/95]"
04/12/95	139	"REPLY by Intervenor Stephen A. Sillman re response [136-1] [5:91-cv-20559] (bfv) [Entry date 04/17/95]"
04/13/95	141	"ORDER by Judge Ronald M. Whyte granting motion for modification of 12/20/94, and 01/10/95, court orders; and opposition to request of Stephen A. Sillman for intervention [135-1], denying motion to intervene [123-1] (Date Entered: 04/21/95) (cc: all counsel) [5:91-cv-20559] (gm) [Entry date 04/21/95]"
07/07/95	148	"LETTER dated 07/06/95 from Daniel G. Stone to Judge Whyte [5:91-cv-20559] (gm) [Entry date 07/12/95]"
07/18/95	149	"LETTER dated 07/18/95 from Joaquin G. Avila to Judge Whyte [5:91-cv-20559] (gm) [Entry date 07/19/95]"
09/07/95	150	"ORDER by Judge Ronald M. Whyte The parties are hereby requested to brief the effect of Miller v. Johnson, 95 Daily Journal D.A.R. 8495 on this case in their status conference statements for the Status conference set for 1:30 9/28/95; (Date Entered 09/14/95) (cc: all counsel) [5:91-cv-20559] (gm) [Entry date 09/14/95]"

Joint Appendix - 19

Relevant Docket Entries for <i>Lopez, et al. v. Monterey County, et al.</i> , Supreme Court Docket No. 95-1201		
Date	Doc. No.	Description *(Part of Court Record - Not on Docket Sheet)
09/21/95	151	"STATUS CONFERENCE STATEMENT by defendant Monterey County [5:91-cv-20559] (gm) [Entry date 09/27/95]"
09/22/95	152	"STATUS CONFERENCE STATEMENT (memorandum) by Intervenor-Defendant California, State of [5:91-cv-20559] (gm) [Entry date 09/27/95]"
09/22/95	153	"STATUS CONFERENCE STATEMENT by Plaintiff [5:91-cv-20559] (gm) [Entry date 09/27/95]"
09/22/95	154	"BRIEF FILED by Intervenor Stephen A. Sillman concerning Miller v. Johnson in response to the three-judge court's order of 09/07/95 [5:91-cv-20559] (gm) [Entry date 09/27/95]"
09/22/95	155	"EXHIBITS re brief [154-1] [5:91-cv-20559] (gm) [Entry date 09/27/95]"
09/22/95	156	"STATUS CONFERENCE STATEMENT by Intervenor Stephen A. Sillman [5:91-cv-20559] (gm) [Entry date 09/27/95]"
09/22/95	157	"PROOF OF SERVICE by Intervenor Stephen A. Sillman of brief concerning Miller v. Johnson in response to the three-judge court's order of 09/07/95; exhibits to brief and status conference statement. [5:91-cv-20559] (gm) [Entry date 09/27/95]"

Joint Appendix - 20

Relevant Docket Entries for <i>Lopez, et al. v. Monterey County, et al.</i> , Supreme Court Docket No. 95-1201		
Date	Doc. No.	Description *(Part of Court Record - Not on Docket Sheet)
09/27/95	*	Letter from Marguerite Mary Leoni to Three Judge Court
09/28/95	*	Letter from United States Department of Justice to Three Judge Court
09/28/95	158	"MINUTES: Status conference. The court will prepare the order. (C/R Lee-Ann Shortridge) [5:91-cv-20559] (gm) [Entry date 10/11/95]"
09/29/95	*	Letter from Marguerite Mary Leoni to Three Judge Court
10/03/95	159	"ORDER by Judge Ronald M. Whyte request for amicus curiae brief from United States (Date Entered: 10/11/95) (cc: all counsel) [5:91-cv-20559] (gm) [Entry date 10/11/95]"
10/03/95	160	"LETTER dated 09/29/95 from Manuel M. Medeiros from California, State of [5:91-cv-20559] (gm) [Entry date 10/11/95]"
10/04/95	161	"REPORTER'S TRANSCRIPT; Date of proceedings: 09/28/95 (C/R: Lee-Ann Shortridge) [5:91-cv-20559] (gm) [Entry date 10/11/95]"
10/05/95	*	Letter from Joaquin G. Avila to Three Judge Court (election schedule)

Joint Appendix - 21

Relevant Docket Entries for <i>Lopez, et al. v. Monterey County, et al.</i> , Supreme Court Docket No. 95-1201		
Date	Doc. No.	Description *(Part of Court Record - Not on Docket Sheet)
10/10/95	162	"BRIEF FILED by defendant Monterey County ⁷ regarding order [159-2] [5:91-cv-20559] (gm) [Entry date 10/12/95]"
10/13/95	163	"LETTER dated 10/10/95 from Douglas Holland from Monterey County [5:91-cv-20559] (gm) [Entry date 10/24/95]"
10/17/95	164	"RESPONSE by Intervenor-Defendant California, State of re brief [162-1] [5:91-cv-20559] (gm) [Entry date 10/24/95]"
10/18/95	165	"RESPONSE by Plaintiff re response [164-1] [5:91-cv-20559] (gm) [Entry date 10/24/95]"
10/19/95	*	Letter from Marguerite Mary Leoni to Three Judge Court
11/01/95	166	"ORDER by Judge Ronald M. Whyte modifying injunction (Date Entered: 11/09/95) (cc: all counsel) [5:91-cv-20559] (gm) [Entry date 11/09/95]"
11/08/95	167	"LETTER dated 11/03/95 from Douglas Holland from Monterey County [5:91-cv-20559] (gm) [Entry date 11/09/95]"

⁷ Docket Entry No. 162 is incorrectly designated as a document filed by Monterey County. The correct designation should be the United States.

Joint Appendix - 22

Relevant Docket Entries for <i>Lopez, et al. v. Monterey County, et al.</i> , Supreme Court Docket No. 95-1201		
Date	Doc. No.	Description *(Part of Court Record - Not on Docket Sheet)
11/14/95	168	"NOTICE by Plaintiffs to opposing parties of intent to file a motion for leave to file a motion for reconsideration and to file an expedited motion for adjudication of motion for reconsideration [5:91-cv-20559] (gm) [Entry date 11/17/95]"
11/20/95	169	"ANSWER by Intervenor-Defendant California, State of to complaint [1-1] [5:91-cv-20559] (gm) [Entry date 11/28/95]"
11/20/95	170	"LETTER dated 11/15/95 from Douglas Holland from Monterey County [5:91-cv-20559] (gm) [Entry date 11/28/95]"
11/20/95	172	"ORDER clarifying order modifying injunction by Judge Ronald M. Whyte (Date Entered: 12/05/95) (cc: all counsel) [5:91-cv-20559] (gm) [Entry date 12/05/95]"
11/21/95	171	"MOTION before Judge Ronald M. Whyte by Plaintiff for leave to file a motion for reconsideration [5:91-cv-20559] (gm) [Entry date 11/28/95]"
11/21/95	--	"RECEIVED Order (Plaintiff) re: [171-1] [5:91-cv-20559] (gm) [Entry date 11/28/95]"
11/21/95	173	"ORDER approving resolution and modified election schedule by Judge Ronald M. Whyte (Date Entered: 12/05/95) (cc: all counsel) [5:91-cv-20559] (gm) [Entry date 12/05/95]"

Joint Appendix - 23

Relevant Docket Entries for <i>Lopez, et al. v. Monterey County, et al.</i> , Supreme Court Docket No. 95-1201		
Date	Doc. No.	Description *(Part of Court Record - Not on Docket Sheet)
11/22/95	174	"OPPOSITION by Intervenor-Defendant California, State of to motion for leave to file a motion for reconsideration [171-1] [5:91-cv-20559] (gm) [Entry date 12/05/95]"
11/22/95	175	"ORDER by Judge James Ware Plaintiff is ordered to file and serve the motion on or before 11/29/95. Upon filing, the motion shall be deemed submitted for decision without oral argument. (Date Entered: 12/05/95) (cc: all counsel) [5:91-cv-20559] (gm) [Entry date 12/05/95]"
11/28/95	176	"United States' REQUEST to file response brief [5:91-cv-20559] (gm) [Entry date 12/05/95]"
11/28/95	*	Letter from Marguerite Mary Leoni to Three Judge Court
11/29/95	177	"MOTION before Judge Ronald M. Whyte by Plaintiff for reconsideration and modification of the court's 11/01/95, order modifying injunction [5:91-cv-20559] (gm) [Entry date 12/05/95]"
11/29/95	178	"DECLARATION by Joaquin G. Avila on behalf of Plaintiff re motion for reconsideration and modification of the court's 11/01/95, order modifying injunction [177-1] [5:91-cv-20559] (gm) [Entry date 12/05/95]"

Relevant Docket Entries for <i>Lopez, et al. v. Monterey County, et al.</i> , Supreme Court Docket No. 95-1201		
Date	Doc. No.	Description *(Part of Court Record - Not on Docket Sheet)
11/29/95	--	"RECEIVED Order (Plaintiff) re: [177-1] [5:91-cv-20559] (gm) [Entry date 12/05/95]"
11/30/95	179	"ORDER by Judge James Ware denying motion for reconsideration and modification of the court's 11/01/95, order modifying injunction [177-1] () (cc: all counsel) [5:91-cv-20559] (kk) [Entry date 12/11/95]"
11/30/95	189	"NOTICE OF APPEAL by Plaintiff David Serena, Plaintiff William A. Melendez, Plaintiff Crescencio Padilla, Plaintiff Vicky M. Lopez from Dist. Court decision Scheduling order modifying injunction [166-1], order [166-2] Fee status paid [5:91-cv-20559] (lmm) [Entry date 01/08/96]"
12/06/95	180	"NOTICE by Plaintiff of intent to file an expedited motion for stay of order modifying injunction [5:91-cv-20559] (kk) [Entry date 12/11/95]"
12/12/95	182	"Expedited MOTION before Judge Ronald M. Whyte by Plaintiff to stay of order modifying injunction entered on 11/09/95, pending appeal [5:91-cv-20559] (gm) [Entry date 12/19/95]"
12/13/95	--	"RECEIVED Order (Plaintiff) re: [182-1] [5:91-cv-20559] (gm) [Entry date 12/19/95]"

Relevant Docket Entries for <i>Lopez, et al. v. Monterey County, et al.</i> , Supreme Court Docket No. 95-1201		
Date	Doc. No.	Description *(Part of Court Record - Not on Docket Sheet)
12/13/95	183	"PROOF OF SERVICE by Plaintiff of order received [0-0] [5:91-cv-20559] (gm) [Entry date 12/19/95]"
12/14/95	184	"BRIEF as amicus curiae in support of plaintiffs' expedited motion for stay pending appeal by United States' [5:91-cv-20559] (gm) [Entry date 12/19/95]"
12/15/95	*	Letter from Manuel M. Medeiros to Deputy Clerk
12/18/95	185	"OPPOSITION by Intervenor Stephen A. Sillman to motion to stay of order modifying injunction entered on 11/09/95, pending appeal [182-1] [5:91-cv-20559] (gm) [Entry date 12/19/95]"
12/18/95	186	"OPPOSITION by Intervenor-Defendant California, State of to motion to stay of order modifying injunction entered on 11/09/95, pending appeal [182-1] [5:91-cv-20559] (gm) [Entry date 12/19/95]"
01/02/96 ¹	187	"ORDER by Judge Ronald M. Whyte denying motion to stay of order modifying injunction

¹ The date is incorrectly listed on the docket sheet. The correct date is January 2, 1996.

Relevant Docket Entries for <i>Lopez, et al. v. Monterey County, et al.</i> , Supreme Court Docket No. 95-1201		
Date	Doc. No.	Description *(Part of Court Record - Not on Docket Sheet)
01/02/96 Cont'd	187	entered on 11/09/95, pending appeal [182-1] (Date Entered: 01/08/96) (cc: all counsel) [5:91-cv-20559] (gm) [Entry date 01/08/96]"
01/08/96	--	"FILING FEE: fee paid on 11/30/95 in the amount of \$ 105.00, receipt # 96631. [5:91-cv-20559] (lmm)"
01/08/96	--	"Docket fee notification form and case information sheet to the Clerk of the Supreme Court of the United States in Washington, DC [5:91-cv-20559] (lmm)"
01/08/96	--	"Copy of notice of appeal and docket sheet to all counsel [5:91-cv-20559] (lmm)"
02/12/96	190	"Plaintiffs' Notice Regarding Continuing District Court's Jurisdiction"

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Original Filed
SEP 6, 1991
Richard W. Wieking
Clerk, U.S. District Court
Northern District of California
San Jose

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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

VICKY M. LOPEZ, CRESCENCIO
PADILLA, WILLIAM A. MELENDEZ,
JESSE G. SANCHEZ, and DAVID
SERENA,

Plaintiffs,

v.

MONTEREY COUNTY,
CALIFORNIA,

Defendant.

NO.
C-9120559 WAI
EAI
COMPLAINT
FOR
INJUNCTIVE
AND
DECLARATORY
RELIEF
THREE JUDGE
COURT
VOTING
RIGHTS
ACTION

INTRODUCTION

1. This is a voting rights action filed pursuant to Section 5 of the Voting Right Act, 42 U.S.C. 1973 c, seeking both declaratory and injunctive relief. Under Section 5, a covered jurisdiction such as Monterey County, California, cannot enforce or implement any voting qualification or prerequisite to voting, or standard, practice, or procedure with

respect to voting different from that in force or effect on the date of political subdivision's coverage unless such change affecting voting has been approved pursuant to Section 5. Approval under Section 5 is secured by submitting the change affecting voting to either the United States Attorney General or the United States District Court for the District of Columbia for a determination that such change does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race, color or membership in a language minority group. Until such Section 5 approval is secured, the changes affecting voting cannot be implemented or enforced in any elections. This complaint alleges that applicable Monterey County Ordinances consolidating judicial districts in Monterey County have not secured the requisite Section 5 approval. Plaintiffs seek an Order from this Court permanently enjoining the enforcement or implementation of these County Ordinances until the requisite Section 5 approval is secured. If such approval is not forthcoming, Plaintiffs will seek as a remedy the implementation of a temporary and permanent single member district based election plan for the selection of judges to the Monterey County Municipal Court District. Plaintiffs will also seek in conjunction with the implementation of any temporary and permanent single member district based election plan, an Order shortening the terms for the judges of the Monterey County Municipal Court District and a special election for electing judges to the Monterey County Municipal Court District.

JURISDICTION

2. This Court has jurisdiction over this action pursuant to 42 U.S.C. § 1973 c, 28 U.S.C. §§ 1343 (3) & (4), 28 U.S.C. § 2201.

PARTIES

3. Plaintiffs VICKY M. LOPEZ, CRESCENCIO PADILLA, WILLIAM A. MELENDEZ, JESSE G. SANCHEZ, and DAVID SERENA, are citizens of the United States, and

registered voters residing in Monterey County, California.

4. Defendant MONTEREY COUNTY is a governmental entity organized pursuant to the laws of the State of California.

5. Defendant MONTEREY COUNTY is a political subdivision subject to the requirements of Section 5 of the Voting Rights Act. 42 U.S.C. § 1973 c.

FACTS

6. All voting qualifications or prerequisites to voting, or standards, practices, or procedures with respect to voting enacted, adopted, or implemented by Monterey County on or after November 1, 1968 must be submitted for Section 5 approval. 42 U.S.C. § 1973 c.

7. Pursuant to West's Ann. Cal. Gov. Code §§ 25200 and 71040, the Monterey County Board of Supervisors has the authority to modify and consolidate municipal and justice court districts.

8. On January 13, 1976, the Monterey County Board of Supervisors passed and adopted Ordinance No. 2139.

9. Monterey County Ordinance No. 2139 eliminated the Pacific Grove Judicial District, the King City-Greenfield Judicial District, and the San Ardo Judicial District.

10. Monterey County Ordinance No. 2139 divided Monterey County into the Monterey-Carmel Judicial District, the Salinas Judicial District, the Castroville-Pajaro Judicial District, and the Soledad-Gonzales Judicial District.

11. Monterey County Ordinance No. 2139 is a voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting enacted, adopted, or implemented by Monterey County on or after November 1, 1968.

12. Monterey County Ordinance No. 2139 is a change affecting voting which must be submitted for approval pursuant to Section 5 of the Voting Rights Act. 42 U.S.C. § 1973 c.

13. On June 5, 1979, the Monterey County Board of Supervisors passed and adopted Ordinance No. 2524.

14. Monterey County Ordinance No. 2524 consolidated the Monterey Peninsula Judicial District, the North Monterey County Judicial District, and the Salinas Judicial District into the Monterey County Municipal Court District.

15. As a result of Monterey County Ordinance No. 2524, Monterey County was divided into the Monterey County Municipal Court District and the Central Judicial District and the Southern Judicial District.

16. Monterey County Ordinance No. 2524 is a voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting enacted, adopted, or implemented by Monterey County on or after November 1, 1968.

17. Monterey County Ordinance No. 2524 is a change affecting voting which must be submitted for approval pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973 c.

18. On August 2, 1983, the Monterey County Board of Supervisors passed and adopted Ordinance No. 2930.

19. Monterey County Ordinance No. 2930 consolidated the Monterey County Judicial District, the Central Judicial District and the Southern Judicial District into the Monterey County Municipal Court District.

20. As a result of Monterey County Ordinance No. 2930, there is only one Monterey County Municipal Court District.

21. Monterey County Ordinance No. 2930 is a voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting enacted, adopted, or implemented by Monterey County on or after November 1, 1968.

22. Monterey County Ordinance No. 2930 is a change affecting voting which must be submitted for approval

pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973 c.

23. Based upon information and belief, Monterey County Ordinance Nos. 2139, 2524, and 2930, have not been submitted to the United States Attorney General for a determination that such changes do not have the purpose and will not have the effect of denying or abridging the right to vote on account of race, color or membership in a language minority group.

24. Based upon information and belief, no judgment has been obtained from the United States District Court for the District of Columbia pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973 c, declaring that Monterey County Ordinance Nos. 2139, 2524, and 2930, do not have the purpose and do not have the effect of denying or abridging the right to vote on account on race, color, or membership in a language minority group.

25. Based upon information and belief, since Monterey County Ordinance Nos. 2139, 2524, and 2930, have not received the requisite approval pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973 c, these Ordinances are legally unenforceable.

26. Based upon information and belief, notwithstanding the lack of approval as required by Section 5 of the Voting Rights Act, 42 U.S.C. § 1973 c, Defendant MONTEREY COUNTY has implemented the changes affecting voting as specified in Monterey County Ordinance Nos. 2139, 2524, and 2930.

REQUEST FOR THREE JUDGE COURT

27. Pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973 c, the convening of a Three Judge Court is requested.

CLAIM FOR RELIEF

28. Plaintiffs reallege paragraphs 1 through 27 above and incorporate the same as though fully set forth herein.

29. Plaintiffs allege that the adopted and implemented changes in the modification and consolidation of judicial districts as specified in Monterey County Ordinance Nos. 2139, 2524, and 2930, constitute changes affecting voting within the meaning of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973 c.

30. Plaintiffs allege that the failure of Defendant MONTEREY COUNTY to obtain approval of the changes in the modification and consolidation of judicial districts as specified in Monterey County Ordinance Nos. 2139, 2524, and 2930, either through a declaratory judgment of the United States District Court for the District of Columbia or through the administrative process conducted by the United States Attorney General, constitutes a violation of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973 c.

31. Plaintiffs allege that the failure of Defendant MONTEREY COUNTY to secure the requisite Section 5, 42 U.S.C. § 1973 c, approval of Monterey County Ordinance Nos. 2139, 2524, and 2930, renders the implementation of those Ordinances legally unenforceable.

INJUNCTIVE AND DECLARATORY RELIEF

32. This is also an action for declaratory, preliminary and permanent injunctive relief sought pursuant to 28 U.S.C. §§ 2201 and 2202 and Fed.R.Civ.P. 57 and 65. Plaintiffs seek a declaration that the adoption and implementation of Monterey County Ordinance Nos. 2139, 2524, and 2930, violate the protections afforded by Section 5 of the Voting Rights Act, 42 U.S.C. § 1973 c, thereby making injunctive relief appropriate. Unless enjoined, Defendant MONTEREY COUNTY will continue with the enforcement and implementation of the legally unenforceable changes affecting the voting rights of language, racial, and ethnic minority groups residing in Monterey County, California.

BASIS FOR EQUITABLE RELIEF

33. Plaintiffs have no plain, adequate, or complete remedy at law to redress the wrongs alleged herein and this suit

for declaratory judgment and injunctive relief is their only means of securing adequate redress from the Defendants' unlawful practices. Plaintiffs will continue to suffer irreparable injury from the Defendants's acts, policies and practices set forth herein unless enjoined by this Court.

PRAYER

WHEREFORE, Plaintiffs respectfully pray that this Court enter judgment granting Plaintiffs:

- (a) A declaration that the adoption and implementation of Monterey County Ordinance Nos. 2139, 2524, and 2930, constitute changes affecting voting within the meaning of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973 c, and are legally unenforceable absent the requisite Section 5 approval;
- (b) A permanent injunction restraining and enjoining the Defendants, its officers, agents, employees, attorneys and successors in office and all other persons in active concert and participation with them, from any further implementation or enforcement of Monterey County Ordinance Nos. 2139, 2524, and 2930, unless and until said changes affecting voting are approved pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973 c;
- (c) An order, in the event the requisite approval pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973 c, is not secured, shortening the terms of the judges of the Monterey County Municipal Court District and requiring a special election for the judges of the

Monterey County Municipal Court District, said election based upon the judicial districts in existence on November 1, 1968; or, alternatively,

- (d) An order, in the event the requisite approval pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973 c, is not secured, requiring the implementation of a temporary and permanent single member district based election plan for the selection of judges to the Monterey County Municipal Court District, said plan to comply with Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, by not fragmenting or over concentrating language, racial and ethnic minority communities of interest and denying racial and ethnic minority voters of an equal opportunity to participate in the political process and elect candidates of their choice;
- (e) An order granting Plaintiffs their costs of court, necessary expenses of litigation and reasonable attorneys' fees to be adjudged against the Defendant as provided for under 42 U.S.C. §§ 1973 l (e) and 1988;
- (f) An order retaining jurisdiction to render such further and additional orders as the Court may, from time to time, deem appropriate; and
- (g) An order granting such other additional relief at law or in equity as may be deemed appropriate.

DATED: September 6, 1991

JOAQUIN G. AVILA
BARBARAY.PHILLIPS

By:

_____/s/____

JOAQUIN G. AVILA
Attorney for Plaintiffs

(Summons Omitted in Printing)

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Attorney for Defendant Monterey County,
California

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

VICKY M. LOPEZ, CRESCENCIO
PADILLA, WILLIAM A. MELENDEZ,
JESSE G. SANCHEZ, and DAVID
SERENA,

Plaintiffs,

vs.

MONTEREY COUNTY,
CALIFORNIA,

Defendant.

NO.
C-9120559 WAI
EAI

ANSWER TO
COMPLAINT
FOR
INJUNCTIVE
AND
DECLARATORY
RELIEF

The Defendant, Monterey County, California, ("Monterey County") answers the Plaintiffs' Complaint for Injunctive and Declaratory Relief as follows:

1. Monterey County acknowledges that the Complaint has purportedly been filed pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973 c, and purportedly seeks declaratory and injunctive relief. Monterey County further acknowledges that pursuant to the express terms of Section 5, a voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on the date of the political subdivision's coverage must be

approved pursuant to Section 5. Approval under Section 5 is secured by submitting the change affecting voting to either the United States Attorney General or the United States District Court for the District of Columbia for a determination that the proposed change does not have the purpose, and will not have the effect, of denying or abridging the right to vote on account of race, color, or membership in a language minority group. Until such Section 5 approval is secured, no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure. Monterey County further acknowledges, but does not admit the allegation, that the Complaint alleges that applicable Monterey County ordinances consolidating judicial districts in Monterey County have not secured the requisite Section 5 approval. Monterey County also acknowledges that the Plaintiffs are seeking an Order from this court permanently enjoining the enforcement or implementation of certain specified ordinances until the requisite Section 5 approval is secured. Except as otherwise acknowledged in this paragraph, Monterey County denies having sufficient knowledge or information to form a belief as to the allegations contained in Paragraph 1 of the Complaint, and on this basis denies such allegations.

2. Monterey County admits the allegations contained in Paragraph 2 of the Complaint.

3. Monterey County denies having sufficient knowledge or information to form a belief as to the allegations contained in Paragraph 3 of the Complaint and on this basis denies such allegations.

4. Monterey County admits that Monterey County is a governmental entity organized under the laws of the State of California and further alleges that Monterey County is a legal subdivision of the State of California.

5. Monterey County admits that Monterey County is a political subdivision of the State of California subject to the requirements of Section 5 of the Voting Rights Act.

6. Monterey County admits the allegations contained in Paragraph 6 of the Complaint.

7. Monterey County admits that Monterey County has authority to modify and consolidate municipal and justice court districts but denies that at the times alleged in the Complaint such authority was exclusively vested in Monterey County. In this regard, Monterey County alleges that Article 6, Section 5, of the California State Constitution provides that the State Legislature must provide for the division of each County of the State, including Monterey County, into municipal and justice court districts and is required to provide for the organization and prescribe the jurisdiction of municipal and justice courts and the number, qualifications, and compensation of judges, officers, and employees.

8. Monterey County admits the allegations contained in Paragraphs 8, 9, 10, 11, and 12 of the Complaint; however, Monterey County alleges that the actions of Monterey County described in such paragraphs were affirmed, ratified, approved, and adopted by the State of California through adoption of Chapter 995 of the 1977 Statutes of the State of California. Monterey County further alleges that Chapter 995 of the 1977 Statutes of the State of California were binding on the County of Monterey, and Monterey County was therefore required to enforce and implement such provisions and conduct its elections in full compliance with such provisions.

9. Monterey County admits the allegations contained in Paragraphs 13, 14, 15, 16, and 17 of the Complaint; however, Monterey County alleges that the actions of Monterey County described in such paragraphs were affirmed, ratified, approved, and adopted by the State of California through the adoption of Chapter 694 of the 1979 Statutes of the State of California. Monterey County further alleges that pursuant to Chapter 694 of the 1979 Statutes of the State of California, Article 7 was added to Chapter 10 of Title 8 of the California Government Code, which in essence repealed the then existing provisions

relative to the establishment of judicial districts for the municipal court in Monterey County and enacted new provisions establishing a single judicial district for the municipal court in Monterey County. The provisions of this State statute were binding on the County of Monterey, and Monterey County was therefore required to enforce and implement such provisions and conduct its elections in full compliance with such provisions.

10. Monterey County admits the allegations contained in Paragraphs 18, 19, 20, 21, and 22 of the Complaint; however, Monterey County alleges that the actions of Monterey County described in such paragraphs were affirmed, ratified, approved, and adopted by the State of California through the adoption of Chapter 1249 of the 1983 Statutes of the State of California. Monterey County further alleges that Chapter 1249 of the 1983 Statutes of the State of California retained the single judicial district status of the municipal court of Monterey County and the provisions of this State statute were binding on Monterey County, and Monterey County was therefore required to enforce and implement such provisions and conduct its elections in full compliance with such provisions.

11. Monterey County admits the allegations contained in Paragraphs 23 and 24 of the Complaint; except that Monterey County alleges that the State of California, on or about October 30, 1984, with the full cooperation and participation of Monterey County, did submit Chapter 1249 of the 1983 Statutes of the State of California, together with Monterey County Ordinance No. 2930, to the United States Attorney General for a determination that such changes did not have the purpose and would not have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group.

12. Monterey County denies the allegations contained in Paragraph 25 of the Complaint and in this regard alleges that Chapter 1249 of the 1983 Statutes of the State of California did receive requisite approval pursuant to Section 5 of the Voting

Rights Act. Monterey County further alleges that approval of such Chapter 1249 constituted approval of Monterey County Ordinance No. 2930.

13. Monterey County denies the allegations contained in Paragraph 26 of the Complaint except that Monterey County admits that it did implement Monterey County Ordinance Nos. 2139, 2524, and 2930 as provided under the laws of the State of California.

14. In answering Paragraph 28 of the Complaint, Monterey County realleges Paragraphs 1 through 13 of this Answer.

15. Monterey County denies the allegations contained in Paragraphs 29, 30, 31, 32, and 33 to the Complaint.

16. Monterey County, as an affirmative defense, alleges that the Complaint fails to state a claim on which the relief requested in the Complaint can be granted.

17. Monterey County, as an affirmative defense, alleges that Plaintiffs have failed to join a party needed for the just adjudication of Plaintiffs' alleged claim pursuant to the requirements of Rule 19 of the Federal Rules of Civil Procedure. Monterey County is a political subdivision of the State of California, and the actions of Monterey County complained of in the Complaint were dependent upon affirmation, ratification, approval, or adoption by the State of California. In addition, the statutes of the State of California are binding and enforceable against Monterey County. Chapter 995, 1977 Statutes, Chapter 694, 1979 Statutes, and Chapter 1249, 1983 Statutes (collectively "the State Statutes") of the State of California, are voting qualifications or prerequisites to voting, or standard practice or procedure with respect to voting, applicable to Monterey County, enacted, adopted, or implemented on or after November 1, 1968. The State Statutes are changes affecting voting which must be submitted for approval pursuant to Section 5 of the Voting Rights Act. Based upon information and belief, Chapter 995, 1977 Statutes, and Chapter 694, 1979 Statutes,

have not been submitted to the United States District Court for the District of Columbia or the United States Attorney General pursuant to Section 5 of the Voting Rights Act. In order to fashion a full and complete remedy consistent with the claim of the Plaintiffs, if a remedy is warranted, the State of California should be joined as a party defendant to this action. The State of California is subject to the jurisdiction of this Court as to both service of process and venue, and can be made a party to this action without depriving this court of jurisdiction of the present parties.

WHEREFORE, Monterey County respectfully prays that this Court enter judgment:

- (1) Denying each and every component of relief sought by the Plaintiffs;
- (2) Granting Monterey County its costs of court, necessary expenses of litigation, and reasonable attorneys' fees; and
- (3) Granting such additional relief at law or equity as may be deemed appropriate.

DATED: October 25, 1991.

/s/

DOUGLAS C. HOLLAND

County Counsel

(Declaration of Service Omitted in Printing)

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Original Filed
JAN 09, 1991*
Richard W. Wieking
Clerk, U.S. District Court
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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**
VICKY M. LOPEZ, CRESCENCIO
PADILLA, WILLIAM A. MELENDEZ,
JESSE G. SANCHEZ, and DAVID
SERENA,
Plaintiffs,
v.
MONTEREY COUNTY,
CALIFORNIA,
Defendant.

NO.
C-91-20559 WAI
(EAI)

STIPULATED
TEMPORARY
RESTRaining
ORDER
THREE JUDGE
COURT
VOTING
RIGHTS
ACTION

Both the Plaintiffs and the Defendant in this action, which was filed pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973 c, hereby stipulate, through their respective legal counsel, to the postponement of the time periods for the issuance of petitions for gathering signatures in lieu of filing fees and other applicable election filing periods and deadlines for the office of Municipal Court Judge for the Monterey County
*(Please note that year is incorrect. The year should be 1992.)

Municipal Court District. In accordance with the Memorandum Order of the California State Supreme Court in Wilson v. Eu (Assembly of State of Cal.), 54 Cal.3d 546, 286 Cal. Rptr. 625 (Cal. 1991), these election filing periods and deadlines shall commence on February 10, 1992. This postponement shall permit this Court to resolve Plaintiffs' Motion for Summary Judgment which shall be filed shortly.

This postponement of election schedules is necessary in order to avoid any irreparable damage which may result by conducting elections for the Monterey County Municipal Court District based upon changes in the law affecting voting which may be determined to be subject to the Section 5 preclearance provisions of the Voting Rights Act. 42 U.S.C. § 1973 c. Clark v. Roemer, __ U.S. __, __, 111 S.Ct. 2096, 2101 (1991). This postponement of election schedules can be further extended by Order of this Court. This Court has jurisdiction to issue this Stipulated Temporary Restraining Order pending the convening of a Three Judge Court. 28 U.S.C. § 2284 (b) (3).

Based upon the foregoing stipulation, IT IS HEREBY ORDERED that all applicable election filing periods and deadlines for the office of Municipal Court Judge for the Monterey County Municipal Court District be postponed until February 10, 1992, and shall conform to the same filing periods and deadlines established for members of the California State Legislature by the California Supreme Court in Wilson v. Eu (Assembly of State of Cal.), *supra*.

DATED: Jan. 7, 1991*

WILLIAM A. INGRAM
UNITED STATES DISTRICT
COURT JUDGE

Agreed as to Substance and Form:

DATED: 12/20/91

DOUGLAS C. HOLLAND
COUNTY COUNSEL
LEROY W. BLANKENSHIP

*(Please note that year is incorrect. The year should be 1992.)

DEPUTY COUNTY COUNSEL

By: _____

/s/

DOUGLAS C. HOLLAND
ATTORNEY FOR DEFENDANT

DATED: Dec. 19, 1991

JOAQUIN G. AVILA
BARBARA Y. PHILLIPS

By: _____

/s/

JOAQUIN G. AVILA
Attorney for Plaintiffs

Filed

JUN 24, 1992

Richard W. Wieking

Clerk, U.S. District Court

Northern District of California

San Jose

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

VICKY M. LOPEZ, CRESCENCIO
PADILLA, WILLIAM A. MELENDEZ,
JESSE G. SANCHEZ, and DAVID
SERENA,

Plaintiffs,

v.

MONTEREY COUNTY,
CALIFORNIA,

Defendant.

NO.
C-91-20559-
RMW (EAI)

NOTIFICATION
OF REQUEST
FOR THE
CONVENING
OF A THREE
JUDGE COURT

Plaintiffs have requested that a court of three judges be convened, pursuant to 42 U.S.C. § 1973 c and 28 U.S.C. § 2284 (a), to determine this voting rights action. On May 11, 1992, the court issued a tentative decision, denying plaintiffs' request for the convening of a three judge court but requesting that the parties submit further briefing with respect to the issue. The court has read and considered both plaintiffs' and defendant's briefs and concludes that its tentative decision is wrong and that plaintiffs' request is, in fact, meritorious.

Plaintiffs filed this action pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973 c, seeking both declaratory and injunctive relief. Plaintiffs' complaint alleges that between 1977 and 1983, the Monterey County Board of Supervisors adopted and implemented County Ordinances Nos. 2139, 2524

and 2930, consolidating the County's judicial districts into one county judicial district. The complaint further alleges that these ordinances have not received the necessary Section 5 preclearance. Without such preclearance, plaintiffs contend that defendant has held elections in violation of federal law.

Defendant answered the complaint, contending that the court cannot grant the relief requested by plaintiffs but can only, rather, order the defendant to submit the ordinances for preclearance. In addition, the defendant contends that the State of California should be joined as an indispensable party.

The standards for determining when a court of three judges should be convened are set forth in 28 U.S.C. § 2284 (a), which provides in relevant part that a three judge court "shall be convened when otherwise required by an Act of Congress" Section 5 of the Voting Rights Act (42 U.S.C. § 1973 c) specifically provides that any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of 28 U.S.C. § 2284. Accordingly, the court hereby notifies the chief judge of the circuit of plaintiffs' request for the convening of a three judge court.

DATED: JUNE 24, 1992

/s/
RONALD M. WHYTE
United States District Judge

Filed
APR 1, 1993
Richard W. Wieking
Clerk, U.S. District Court
Northern District of California
San Jose

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

VICKY M. LOPEZ, CRESCENCIO
PADILLA, WILLIAM A. MELENDEZ,
JESSE G. SANCHEZ, and DAVID
SERENA,

Plaintiffs,

v.

MONTEREY COUNTY,
CALIFORNIA,

Defendant.

NO.
C-91-20559-
RMW (EAI)

ORDER
GRANTING
PLAINTIFFS'
MOTION FOR
PARTIAL
SUMMARY
JUDGMENT
AND
DENYING
DEFENDANT'S
MOTIONS

PANEL: Circuit Judge Mary M. Schroeder and
District Judges James Ware and Ronald
M. Whyte

I. INTRODUCTION

Plaintiffs challenge the implementation of six Monterey County Ordinances governing the number of municipal and justice court election districts as violating Section 5 of the Voting Rights Act of 1965. Plaintiffs contend that the ordinances were not precleared by the Attorney General or by a declaratory judgment of the United States District Court for the District of Columbia as required by Section 5. Over a period of

twelve years, the six ordinances reduced ten judicial election districts to one. Plaintiffs, who are Latino voters, complain that the current voting procedure precludes their access to the judicial election process for the Municipal Court District. Although Latinos constitute 34% of the County's population, there is not a single Latino Municipal Court judge. Plaintiffs seek summary judgment declaring that preclearance was not obtained and, therefore, the ordinances, as a matter of law, cannot be implemented.

Monterey County ("County") asserts that preclearance is not necessary on the alternative grounds that either Section 5 is not applicable to the ordinances or that the ordinances received "implicit" clearance through the Justice Department's preclearance of state "enabling" legislation. The County also contends that the State of California is a necessary and indispensable party to this action and that, if the state cannot be joined, then the action must be dismissed.

Pursuant to the provisions of Title 28 U.S.C. § 2284, the motions were heard by a three-judge court consisting of Circuit Judge Mary M. Schroeder, District Judge James Ware and District Judge Ronald M. Whyte, on January 5, 1993. For the reasons set forth below, the court grants plaintiffs' motion to the extent it seeks an adjudication that the ordinances require preclearance and denies the County's motion.

II. BACKGROUND

Beginning in the late 1940's, the State of California became concerned with the need for lower court system reform. Sen. Con. Res. No. 19, 47 Stat. 3448 (1947); Judicial Council of California, *Report to the Governor and the Legislature* 13-73 (1948). In 1950, a constitutional amendment was approved which authorized the implementation of the Judicial Council's plan for lower court reorganization, aimed at the consolidation of municipal courts and justice courts. Cal. Const. art. VI, § 11 (1950); 49 Stats 1286 at 2268 and 49 Stats 1510-18 at 2681-702.

A parallel reorganization effort was undertaken by County. (See Declaration of Bradley Clark ("Clark"), Exhibit A at page 58). In the early 1950's, County consolidated its twenty-two (22) lower courts into ten (10) courts, consisting of two municipal and eight justice court districts. (Clark, "A" at page 59). Accordingly, as of November 1, 1968, the date that Section 5 became applicable to defendant, Monterey County had ten judicial election districts. *Id.* (See also, Plaintiffs' Reply Brief, page 2, footnote 3).

In 1972, Monterey County Ordinance No. 1852 was adopted. This ordinance reduced the number of judicial districts from ten to nine. Ordinance No. 1917, adopted eight months later, reduced the number of districts to eight. Thirteen months later, in 1973, Ordinance No. 1999 was adopted, which reduced the number of judicial districts to seven. In 1977, the judicial districts were consolidated by Ordinance No. 2139, which resulted in the elimination of three judicial election districts. County then had four judicial districts, one of which was eliminated by Ordinance No. 2524, adopted in 1980.

Finally, the three remaining judicial districts were consolidated into one judicial district, the Monterey County Municipal Court District, as a result of the adoption of Monterey County Ordinance No. 2930. The Monterey County Municipal Court District presently consists of ten (10) judges. West's Ann. Cal. Govt. Code § 73562. Although Latinos constitute 34% of the county's population, there is not a single Latino municipal court judge in Monterey County. (See Plaintiffs' Exhibit Nos. 1 and 2). Plaintiffs challenge the adoption of all six (6) ordinances on the basis that none of the ordinances received the necessary preclearance required by Section 5.

III. LEGAL STANDARDS

In addressing both plaintiffs' and County's motion for summary judgment, the court proceeds pursuant to the mandates of Rule 56 (c) of the Federal Rules of Civil Procedure, which provides that summary judgment shall be rendered if the

pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

With respect to County's alternative motion to dismiss/join, the court proceeds pursuant to the mandates of Rule 19 of the Federal Rules of Civil Procedure. Pursuant to Rule 19, the court must first determine if an absent party is "necessary" to the action. Confederated Tribes v. Lujan, 928 F.2d 1496, 1498 (9th Cir. 1991). If the absent party is deemed necessary to the action, and that party cannot be joined, the court must determine whether the party is "indispensable" so that "in equity and good conscience" the action should be dismissed. *Id.*, quoting Makah Indian Tribe v. Verity, 910 F.2d 555, 558 (9th Cir. 1990). With these standards in mind, the court analyzes the motions.

IV. DISCUSSION

A. COUNTY'S MOTION TO DISMISS OR FOR JOINDER

As noted above, the County has move to dismiss plaintiffs' action on the basis that the State of California is a necessary party to this action and that, since the State cannot be joined as a party defendant, the action must be dismissed. Alternately, the County moves to join the State of California as a necessary party defendant. County's motions are discussed separately below.

1. Necessary Party

As noted above, Rule 19 (a) of the Federal Rules of Civil Procedure contemplates a two-part analysis to aid the court in determining if an absent party is necessary. "First, the court must consider if complete relief is possible among those parties already in the action. Second, the court must consider whether the absent party has a legally protected interest in the outcome of the action. [Citations omitted]." Confederated Tribes, *supra* at page 1498.

County takes the position that the State is a necessary party to this action because the County enacted its ordinances only to implement state legislation. County also takes the position that its ordinances "implicitly" received the necessary preclearance as a result of the clearance received by the state statutes. Therefore, County argues, "it is futile for plaintiffs to proceed against County when the County's actions are derivative of, and wholly dependent upon, the preceding actions of the State." (County's Moving Brief, page 13, lines 21-23).

County's position, however, ignores the fact that it is the County's, not the State's, responsibility to seek preclearance of the ordinances at issue herein since it is the County which seeks to implement the ordinances. 42 U.S.C. § 1973c. Therefore, addressing the first part of the Rule 19(a) analysis, complete relief is possible among the parties already involved in this action since the only issue which this court may properly address is whether the particular County ordinances at issue herein are subject to the provisions of the Voting Rights Act, and therefore must be submitted for approval before enactment. Perkins v. Matthews, 400 U.S. 379, 383, 91 S.Ct. 431, 434 (1971), quoting Allen v. State Board of Elections, 393 U.S. 544, 558-559, 89 S.Ct. 817, 828 (1969).

The fact that the County has raised the issue that its ordinances received "implicit" clearance through the preclearance of certain state statutes does not require the court to reach a determination as to whether or not those state statutes also received the required preclearance. Rather, the court need only determine whether or not the state statutes incorporated or referred to the County ordinances at issue herein at the time that the statutes were submitted to the Attorney General for preclearance. Such a determination may be made by reference to the state statutes and the requests for preclearance, all of which is a matter of record before this court.

Accordingly, judgment against the County in this action would have no impact upon the State. A determination by this

court that the County Ordinances did not secure the necessary preclearance would not constitute a finding that the state statutes did not receive the necessary preclearance.

Similarly, the State has no legally protected interest in the outcome of this action. As stated above, the outcome of this action will have no impact whatsoever upon the State. The State statutes are before this court only insofar as they may serve to prove that the County did or did not secure the requisite Section 5 preclearance. Accordingly, the State is not a necessary party to this action. Therefore, the court denies County's motion to dismiss this action.

2. Indispensable Party

Rule 19(b) provides that the factors to be considered to determine whether a nonparty is indispensable are:

- (1) prejudice to any party or to the absent party;
- (2) whether relief can be shaped to lessen prejudice;
- (3) whether an adequate remedy, even if not complete, can be awarded without the absent party; and,
- (4) whether there exists an alternative forum.

Confederated Tribes v. Lujan, 928 F.2d 1496, 1499 (9th Cir. 1991).

As discussed above, the result of this action will have no impact whatsoever upon the State. Therefore, no prejudice can result to the State by the failure to join the State as a defendant. Similarly, neither party will be prejudiced by the failure of the State to be joined. Adequate relief can be afforded to either party without the presence of the State. Therefore, the court denies the County's motion for joinder, although the court notes that the State may intervene in this action if it so desires.

B. CROSS-MOTIONS FOR SUMMARY JUDGMENT

Plaintiffs filed this action to enforce the preclearance provisions of Section 5 of the Voting Rights Act of 1965, 79

Stat. 439, 42 U.S.C. § 1973c. Plaintiffs have moved for summary judgment, contending that the County is implementing Ordinances which require, and have not received, Section 5 preclearance. Section 5 provides in pertinent part that:

Whenever a State or political subdivision shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968 such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General ...

As a covered jurisdiction, County must comply with

Section 5 if it seeks to "administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968." All ordinances at issue herein have been enacted and adopted since 1968.

County has also moved for summary judgment, asserting that these ordinances simply concluded a consolidation process which began prior to the applicable date of coverage of Section 5 and that, therefore, "no change affecting voting" occurred and Section 5's preclearance requirements were not triggered. Alternatively, County asserts that its ordinances implicitly received the necessary preclearance through the preclearance of several state statutes. Each of these contentions is addressed separately below.

1. Change Affecting Voting

County contends, as noted above, that since the process of consolidation of the lower courts began prior to the County's applicable date of coverage, all subsequent steps taken to implement that process do not trigger the requirements of Section 5. However, a similar argument was considered and rejected by the United States Supreme Court in City of Lockhart v. United States, 103 S.Ct. 998, 1002-1003, 460 U.S. 125, 131-132 (1983). In Lockhart, the City contended that Section 5 did not apply to its "continuation" of two of its council seats and the continued use of numbered posts. The Court rejected the City's argument and concluded that there had been a change with respect to all of the council seats and to the use of numbered places.

Similarly, the court finds that the County ordinances disputed herein constitute a change in voting procedure different from that in force or effect on November 1, 1968. On that date, there were ten judicial election districts. Today, as a result of the adoption and implementation of the ordinances, there is one judicial election district. Accordingly, the court concludes that the ordinances were subject to the requirements of Section 5.

2. Implicit Clearance

County next contends that, even assuming its ordinances were covered by Section 5, Section 5's requirements were satisfied by the preclearance or relevant state statutes which operated to implicitly preclear the county ordinances. Specifically, County contends that the Attorney General's approval of Senate Bill 676 (State Statute 1249) operated as an implicit clearance of all predecessor, unsubmitted legislation that was merged into Senate Bill 676. County relies upon the holding in Woods v. Hamilton, 473 F.Supp. 641 (D.C.S.C. 1979), to support its contention.

In Woods, plaintiffs challenged the County's enforcement of local ordinances which had been adopted to implement a state statute which had received the necessary Section 5 preclearance. The statewide legislation, the South Carolina 1975 Home Rule Act, was submitted to and approved by the Attorney General. It was undisputed that the County had previously precleared a form of Home Rule in June of 1969. The 1975 Home Rule Act, as applied to the County, continued without change the exact form of government that had been previously precleared. However, the 1975 Home Act gave the County Council a new name and increased its powers at the expense of the county legislative delegation.

In its request for Section 5 preclearance of the 1975 Home Rule Act, it was apparent, and the court so found, that the state had submitted the entire Home Rule Act to the Attorney General for consideration. The Charleston County Attorney, pursuant to instructions from the State Attorney General, submitted the Home Rule Ordinances to the Attorney General of the United States for preclearance. No objections were made by the U.S. Attorney General within the proscribed sixty (60) day period. Accordingly, the Home Rule Ordinances were "cleared" under § 5 of the Voting Rights Act.

In this action, however, it is undisputed that the County ordinances were not submitted to the Attorney General. In

addition, 28 C.F.R. § 51.15 specifically requires that implementation ordinances be submitted for § 5 preclearance. Section 51.15 provides, in pertinent part:

- (a) With respect to legislation (1) that enables or permits the State or its political subunits to institute a voting change or (2) that requires or enables the State or its political subunits to institute a voting change upon some future event or if they satisfy certain criteria, the failure of the Attorney General to interpose an objection does not exempt from the preclearance requirement the implementation of the particular voting change that is enabled, permitted, or required, unless that implementation is explicitly included and described in the submission of such parent legislation.

Accordingly, County was required to submit the ordinances herein to the Attorney General for preclearance, unless the implementation was explicitly included and described in the submission of the parent, state legislation.

County correctly points out that § 51.15 was not in effect when the state statutes were precleared, between 1976 and 1986. However, County ignores the fact that § 51.14 was in effect, at least as of 1981. Section 51.14 contained the same provisions as are now contained in Section 51.15. Senate Bill 676 (State Statute 1249) was approved in 1983. Therefore, to receive preclearance, the County Ordinances must have been included and described in Statute 1249. Accordingly, the court reviews the language contained in State Statute 1249.

(a) State Statute 1249

Senate Bill No. 676, Chapter 1249, approved by the Governor in September of 1983, amended Government Code

Section 73562¹ to read as follows:

There shall be seven judges of the Monterey County Municipal Court District; provided, that at such time as the Central and Southern Justice Court Districts are consolidated with the Monterey County Municipal Court District, there shall be nine judges of the Monterey County Municipal Court District.²

Chapter 1249, then, clearly mentioned the possible consolidation of the Central and Southern Justice Courts into the Monterey County Municipal Court District. The consolidation referenced in Chapter 1249 was accomplished by Local County Ordinance No. 2930. Therefore, County takes the position that the Attorney General's clearance of State Statute 1249 operated to preclear all prior County Ordinances which had consolidated the judicial districts. In support of its position, County relies upon certain dicta in the McCain v. Lybrand, 104 S.Ct. 1037 (1984) case which implies that, under certain circumstances, preclearance by implication may be appropriate. However, as

¹ Senate Bill 676, Chapter 1249 also amended additional Government Sections. However, those sections are not relevant to the discussion herein.

² Government Code Section 73562 was subsequently amended in 1985 and 1987 to change the number of judges from seven to nine and ten, respectively. Senate Bill No. 1245, Chapter 659, at issue herein, specifically amended Government Code Section 73562 to change the number of judges from seven to nine after the consolidation of the judicial districts had been accomplished by Ordinance 2930. County has stated that Chapter 659 has received the requisite § 5 preclearance. The 1987 amendment to Government Section 73562, changing the number of judges from nine to ten, has not been presented to this panel and, presumably, is not at issue herein.

recently noted by the United States Supreme Court,

McCain establishes a presumption that the Attorney General will review only the current changes in election practices effected by the submitted legislation, not prior unprecleared changes reenacted in the amended legislation. A submission's description of the change from one number of judges to another in a particular judicial district does not, by itself, constitute a submission to the Attorney General of the prior voting changes incorporated in the newly amended statute. Clark v. Roemer, 111 S.Ct. 2096, 2104 (1991).

County's attempt to distinguish, both factually and legally, the holdings in McCain and Clark is unavailing. Contrary to County's contention, the precleared state "enabling" legislation at issue herein is not "companion and substantively identical" to the unsubmitted local implementation legislation. In fact, of the four precleared state statutes, only two even mention consolidation of judicial districts, namely, statutes 1242 and 1249. Both statutes mention consolidation, but neither statute explicitly or implicitly provides for such consolidation.

Even assuming that the Attorney General's clearance of State Statute 1249 operated to implicitly preclear County Ordinance 2930 to which the statute referred, the parties agreed during the oral argument in this matter that all six (6) ordinances should be submitted for preclearance if all ordinances were not precleared. The court finds that the Attorney General's preclearance of State Statute 1249 did not operate to implicitly clear all related, unsubmitted County legislation.

V. CONCLUSION

Based upon the foregoing, it is the finding of this court that Monterey County is a jurisdiction subject to Section 5 preclearance provisions of the Voting Rights Act, 42 U.S.C. § 1973c and that, as such jurisdiction, Monterey County must

submit for preclearance any ordinances which constitute an "election change". The court further finds that the Monterey County Ordinances at issue herein, namely, Ordinances Nos. 1852, 1917, 1999, 2139, 2524 and 2930³, constitute election changes subject to Section 5 preclearance and that, further, the ordinances have not been precleared pursuant to Section 5. Therefore, they cannot be implemented by County until such clearance is received.

Accordingly, the court hereby grants an order for partial summary judgment in favor of plaintiffs and denies defendant's motion to dismiss or for joinder or for summary judgment. The court summarily adjudicates that the ordinances cannot be implemented without preclearance pursuant to Section 5. The parties agreed at the hearing that if the court ruled that preclearance was required, the County would submit the ordinances to the Attorney General for preclearance. The court expects the County to do so within ninety (90) days of the date of this order. The parties are ordered to appear at a further status conference in this matter on Friday, September 3, 1993 at 10:30 a.m. in Courtroom No. 1 of the United States District Court in San Jose to update the court with respect to the status of the preclearance process.

DATED: March 31, 1993

/s/

RONALD M. WHYTE
United States District Judge

³ Even assuming Ordinance 2930 was implicitly cleared, it was agreed at oral argument that all ordinances would be submitted for preclearance.

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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

VICKY M. LOPEZ, CRESCENCIO
PADILLA, WILLIAM A. MELENDEZ,
JESSE G. SANCHEZ, and DAVID
SERENA,

Plaintiffs,

v.

MONTEREY COUNTY, CALIFORNIA,
Defendant.

STATE OF CALIFORNIA,
Intervenor.

NO.
C-91-20559-
RMW (EAI)
(Voting Rights
Action/Three
Judge Court)
OBJECTION OF
THE STATE OF
CALIFORNIA
TO
STIPULATION
AND
PROPOSED
ORDER

Plaintiffs and Defendant County of Monterey have submitted a stipulation and proposed plan for conducting elections for the Monterey County Municipal Court in 1994 consistent with the Voting Rights Act, 42 U.S.C. § 1973c. That plan does not, as might have been expected, create multiple municipal court judicial districts configured so as to safeguard minority voting rights. Instead, the County proposes to retain

a single municipal court judicial district but provide for the election of judges to the court from geographical areas smaller than the whole of the judicial district.

Such a plan conflicts with California's Constitution, laws, and long-standing policy. Moreover, it jeopardizes the orderly administration of justice not only in Monterey County but throughout the State. For these reasons, the State respectfully submits this Objection.

I

**THE COURT SHOULD NOT, BASED SOLELY
ON THE AGREEMENT OF THE PARTIES,
IMPOSE A PLAN FOR ELECTION OF
MUNICIPAL COURT JUDGES, WHICH ALTERS
THE LONG-STANDING STATE PRACTICE OF
BALANCING ACCOUNTABILITY AND THE
EXERCISE OF POWER**

The California Constitution specifies that each county shall be divided into municipal court and justice court districts (Cal. Const., art. VI, § 5(a).) The Constitution specifies further that judges of the municipal and justice court "shall be elected in their . . . districts at general elections." (Cal. Const., art. VI, § 16(b).)

California's municipal and justice courts are intended to be responsive to the ordinary affairs of the citizens of the district. Generally speaking, these courts have jurisdiction over personal and commercial litigation involving less than \$ 25,000. (Cal. Code Civ. Proc., § 86)¹ Thus, small claims matters (Cal. Code Civ. Proc., § 116.210) and residential landlord-tenant disputes (Cal. Code Civ. Proc., § 86(5)) are adjudicated in the municipal and justice courts. Municipal and justice courts have exclusive jurisdiction over violations of city ordinances -- e.g.,

¹ California's superior courts have jurisdiction over all causes save those given by statute to other trial courts. (Cal. Const., art. VI, § 10.)

zoning ordinances, commercial sign ordinances, parking ordinances, noise abatement ordinances, no-smoking ordinances. (Cal. Pen. Code, § 1462(a).) They also have jurisdiction over misdemeanors occurring in the county and over violations of traffic laws and ordinances. (*Id.*) Under California law, the people whose ordinary affairs are subject to the jurisdiction of the municipal court are the very people who elect the court's judges.²

Since its inception, California has provided for the election of its judges, the electoral basis for the judge being the geographical area encompassing those persons and that property which would generally be subject to a judgment of the court. California's 1849 Constitution required the Legislature to divide the state into several judicial districts, with a district court in each, and the Constitution provided that district judges were to be elected "by the qualified electors of their respective districts." (Cal. Const., art. VI, § 5 (1849).) This same Constitution also provided that, "[t]here shall be elected in each of the organized counties of this State, one County Justice." (Cal. Const., art. VI, § 8 (1849).)³

Following the 1879 Constitutional Convention, the state's new Constitution provided for a superior court in each county, "for each of which at least one judge shall be elected by the qualified electors of the county." (Cal. Const., art. VI, § 6 (1879).) The new Constitution also provided that the

² With limited exceptions, civil actions against persons must be brought in the judicial district wherein the defendant resides. (Cal. Code Civ. Proc., § 395.) Similarly, actions *in rem* are brought in the judicial district wherein the property is located. (Cal. Code Civ. Proc., § 392.)

³ As amended in 1862, the Constitution specified that the County Judge, "shall be elected by the qualified electors of the county." (Cal. Const., art. VI, § 7 (1862).)

Legislature, "shall determine the number of Justices of the Peace to be elected in townships, incorporated cities and towns, or cities and counties." (Cal. Const., art. VI, § 11 (1879).) The jurisdiction of justices of the peace was limited to the city or township from which they were elected.⁴

By 1893, county boards of supervisors were expressly

⁴ Although, the general rule was that township justice courts had jurisdiction co-extensively only with the township within which they were elected (*see* Cal. Stats. 1850, ch. 73, p. 179, § 2), an exception was made for the City and County of San Francisco. In 1857, the Legislature authorized a unique, hybrid creation of six justice's courts in the City and County of San Francisco, for which the board of supervisors was to divide the city and county into six townships. Each justice was to be elected by the electors of the respective township. The Legislature provided: "The justices of the peace so elected shall have jurisdiction co-extensive with the city and county, but shall hold their courts within the townships for which they were chosen respectively." (Cal. Stats. 1857, ch. 190, p. 210, § 2.)

The scheme was replaced less than 10 years later, in 1866, by creation of a single five-member justice's court for the City and County of San Francisco, with each judge elected at large. (*See Kahn v. Sutro, supra*, 114 Cal. 316, 332.) Thereafter, the jurisdiction of justice's courts was specified to be co-extensive with the city, city and county, or township, respectfully, from which the judge was elected. (*See* Cal. Code Civ. Proc., §§ 114, 116 (1872); Amend. Code Civ. Proc. 1880, § 106, 3 Hittel, *Codes and Statutes* (Supp. 1880) §§ 94, 106.)

Beginning in 1933, municipal and justice courts were given statewide jurisdiction over specified causes (*see* Cal. Code Civ. Proc., § 84), although proper venue remains in the relevant municipal and justice court where venue for civil actions is based on the residence of the defendant or the location of the property. (*See* Code Civ. Proc., §§ 392, 395.)

invested with power to divide their counties into townships for the purpose of electing justices of the peace. (Stats. 1893, p. 351, § 25; *see also*, Stats 1947, ch. 424, § 1, p. 1176.) Where the justice of the peace presided over a city justice's court, the electoral base was the city; where the justice of the peace presided over a township justice's court, the electoral base was the township. (*See Kahn v. Sutro*, 114 Cal. 316, 332 (1896) [Legislature has not provided for a system of town governments; purpose of division of city into townships is solely to provide for election of justices of the peace]; *see also*, *In re Romero*, 207 Cal. 341, 345 (1929) ["The city justice's court is an office of the city, and the justice thereof is elected by the electors of said city. The township justice's court is a township office and the incumbent of said office is elected by the electors of said township."].)

In 1949, county boards of supervisors were authorized to "divide the county into *judicial districts* for the purpose of electing judges and other officers of the municipal court and justice courts." (Stats. 1949, ch. 1511, p. 2694, § 1 (emphasis added).) This power is now found in California Government Code section 71040.

Thus, since 1850, California policy has been to subject trial court judges to election by all those over whom, and over whose property, the court would generally extend its jurisdiction, i.e., those persons who would generally be summoned before the court as defendants in civil actions (*see* Cal. Code Civ. Proc., § 393) and whose property could be the subject to proceedings for divestiture by the courts (*see* Cal. Code Civ. Proc., § 392). As noted *ante*, these would be the same electors who would have an interest in the manner in which the judge they elect administers justice respecting the violation of non-felonious criminal laws in that jurisdiction.

The parties to the instant proceeding propose to substitute for the present uniform system for electing municipal and justice court judges a system for Monterey County that

would dissociate a judge's jurisdictional base from his or her electoral base. Under the proposed plan, for example, enforcement of a city's ordinances could be subject to the jurisdiction of judges who are in no way accountable to the citizens of the city whose ordinance is at issue.⁵

Indeed, the scheme proposed by the parties would eliminate the system of elected municipal court judges for all electors in the municipal court district *except* for those electors in the smaller electoral area from which the judge was elected. As to *all others* within the municipal court district, the judge is tantamount to an *appointed* judge. Furthermore, those electors for whom the judge is selected by others have no recourse whatsoever against the "appointing power," viz., the electors of the smaller "election area."

The issue is not whether defendants have a right to trial by a judge whom they had an opportunity to elect. Defendants in one jurisdiction not uncommonly find themselves subject to the trial jurisdiction of an assigned judge elected from another jurisdiction.

Rather, the issue is whether judges should be elected according to a system that holds them answerable to only a few of those over whom the judge would exercise considerable power. Such a system invites corruption and "ward politics" (*see League of United Latin Amer. Citizens v. Clements*, 999 F.2d 831, 869, 871-873 (5th Cir. 1993), *pet. cert. filed* 10/23/93 (hereafter, *LULAC*)), inasmuch as a candidate for the bench need only satisfy a fraction of the comparatively few voters of his or her "election area" in order to secure a seat having district-wide jurisdiction. Even if *every voter in the remainder*

⁵ Under present law, no city may be divided by the creation of a municipal court district. (Cal. Gov. Code, § 71040.) This ensures that a municipal court judge must stand election before *all* of the voters of every city within the judicial district.

of the district sought the judge's ouster, they would be powerless to effect that result against the vote of the few in the judges "election area."

The scheme proposed by the parties brings with it the potential for confusion and multiple litigation challenging the capacity of "election area" judges to exercise the judicial power of the State. California law requires that municipal court judges be elected in the whole of their *judicial districts* (Cal. Const., art. VI, § 16(b); Cal. Gov. Code, § 71040.) Even were this Court to order implementation of an election plan based on "election areas" rather than the judicial district, the Court has no power to make the judges so elected qualified to exercise judicial power under the laws of this State.

The office of municipal court judge is one conferred by district election. (See *People v. Crespi*, 115 Cal. 50, 54 (1896) [distinguishing the office of magistrates which is conferred by statute].) Accordingly, imposition of the plan proposed by the parties would cloud civil judgments and criminal convictions rendered by these "election area" judges. Questions necessarily arise, for example, whether election of by "election area" only fills a vacancy in office such as to preclude appointment by the Governor (Cal. Const., art. VI, § 16(c)); whether "election area" judges may exercise the powers of municipal court judges (see *Koski v. James*, 47 Cal.App.3d 349, 355 [rejecting challenge to jurisdiction of justice court judge, sitting as a magistrate, on the ground that magistrates do not derive their office by election of the district voters, but by statute]); whether such "election area" judges are entitled to compensation or retirement benefits under state law (see Cal. Gov. Code, § 75000 *et seq.*); and whether the Chief Justice of the Supreme Court may assign such judges to other courts (see (Cal. Const., art. VI, § 15["A judge eligible for municipal court service may be assigned by the Chief Justice to serve on any court"]); see also Cal. Gov. Code, § 68540.5 [liability of county to whom judge is assigned for the salary of the assigned judge]).

California has a compelling interest in the qualifications of its judge (see *Gregory v. Ashcroft*, __ U.S. __, 111 S.Ct. 2395, 2407; *LULAC*, supra, 999 F.2d at 872.) It is the ideal of the California Constitution that the suitability of an individual to be a trial court judge in California should be determined by a representative cross-section of the electorate whom the judge would serve. (See e.g., J. Ross Browne, *Report of the Debates in the Convention of California* (1850), p. 230 (Remarks of Mr. Ord from Monterey) ["I think that the people of the district will take care that they elect men who will not be swayed by rich men."].) Should this Court find it necessary to impose a municipal court election plan in order to permit the conduct of judicial elections in 1994 in conformity with Section 5 of the federal Voting Rights Act, any such plan should preserve the contiguity of the electoral base of the Monterey County Municipal Court judges and the jurisdictional base of the municipal court district or districts, unless it is determined that dissociation of such contiguity is necessary to ensure compliance with Section 2 of the Voting Rights Act.

II

DEFENDANT MONTEREY COUNTY IS WITHOUT POWER TO STIPULATE TO A SUSPENSION OF THE CALIFORNIA CONSTITUTION

Monterey County is a legal subdivision of the State of California (Cal. Gov. Code, §§ 23002, 23012), purporting to enter into the stipulation and proposed order pursuant to powers enjoyed as a matter of state law. As a matter of state law, counties have only such authority as has been conferred on them by the State Constitution or the Legislature; "they possess and can exercise only those powers that have been so expressly conferred, that are necessarily implied therefrom, or that are indispensable (and not simply convenient) to their operational existence." (*Richter v. Board of Supervisors*, 259 Cal.App.2d 99, 105 (1968); see 68 Ops.Cal.Atty.Gen. 175, 177-178 (1985),

and cases cited therein; see also Cal. Gov. Code § 23033.) Furthermore, whatever powers have not been expressly conferred upon counties, or which are not necessary to the execution of an expressed power, are withheld from them to exercise. (See 68 Ops. Cal. Atty. Gen., *supra*, at 178.)

The Legislature has not invested counties with the power to tender the State Constitution's provisions for federal court "suspension" for the county's convenience. Nor can it reasonably be argued that such a power is reasonably necessary to the execution of any expressed power. The County may not use this Court's equitable powers to accomplish impermissible ends. "Consent is not enough when litigants seek to grant themselves powers they do not hold outside of court." (*LULAC*, *supra*, 999 F.2d at 846.)

CONCLUSION

For the reasons stated herein, the Court should reject the stipulation and proposed election plan.

DATED: December 6, 1993	Respectfully submitted,
DANIEL E. LUNGREN	LINDA CABATIC <u>/s/</u>
Attorney General of the State of California	Supervising Deputy Attorney General
Attorneys for Intervenor State of California	MANUEL M. MEDEIROS Deputy Attorney General

(Declaration of Service Omitted in Printing)

Filed
DEC 22, 1993
Richard W. Wieking
Clerk, U.S. District Court
Northern District of California
San Jose

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

VICKY M. LOPEZ, CRESCENCIO
PADILLA, WILLIAM A. MELENDEZ,
JESSE G. SANCHEZ, and DAVID
SERENA,

Plaintiffs,

v.

MONTEREY COUNTY,
CALIFORNIA,

Defendant.

NO.
C-91-20559-
RMW (EAI)
ORDERS RE:
(1) MOTIONS
TO
INTERVENE;
(2)
APPLICATION
FOR
APPROVAL OF
STIPULA-
TION; (3)
SCHEDULING
OF STATUS
CONFERENCE;
AND (4)
STAYING
DATE FORMS
FOR
PETITIONS
MUST
BE
AVAILABLE

PANEL: Circuit Judge Mary M. Schroeder and
District Judges James Ware and

Ronald M. Whyte

The motion of the State to intervene is granted.

The court declines to grant the application of plaintiffs and defendant Monterey County for a court order approving their stipulated election area plan for the election of municipal judges, absent a clear showing that such a plan is necessary to comply with § 5 of the Voting Rights Act. The proposed plan appears to conflict with Article VI, § 16 (b) of the California Constitution, and the panel is not satisfied that a plan necessarily has to conflict with Article VI, § 16(b) in order to meet the requirements of the Voting Rights Act.

The parties are to appear for a Status Conference on January 14, 1994 at 10:30 a.m. before Judge Whyte to discuss further proceedings in this matter. If, however, the parties make application by January 12, 1994 for approval of a plan that would create municipal court districts configured so as to safeguard minority rights, the court will consider resetting the Status Conference for a later date in order to allow review of the newly submitted plan.

The court hereby stays until January 18, 1994 the date by which forms must be made available to municipal judicial candidates for the securing of signatures for petitions in lieu of filing fees. See: California Elections Code § 6555(b). Such a stay is to allow time for the submission, review, and approval of an election plan that complies with § 5 of the Voting Rights Act without unreasonably interfering with the ability to hold an election in June of 1994.

DATED: 12/22/93

/s/
RONALD M. WHYTE
United States District Judge
On Behalf of the Panel

Filed

JAN 21, 1994

Richard W. Wieking

Clerk, U.S. District Court

Northern District of California

San Jose

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

VICKY M. LOPEZ, CRESCENCIO

PADILLA, WILLIAM A. MELENDEZ,

JESSE G. SANCHEZ, and DAVID

SERENA,

Plaintiffs,

v.

MONTEREY COUNTY,

CALIFORNIA,

Defendant.

NO.

C-91-20559-

RMW (EAI)

ORDER RE:

1. MOTIONS

BY JUDGE

FIELDS TO

INTERVENE;

2. SETTING

BRIEFING

SCHEDULE ON

SECOND

STIPULATION

AND ORDER;

3. ABBREVIA-

VIATING

ELECTION

FILING

DEADLINES

PANEL: Circuit Judge Mary M. Schroeder and

District Judges James Ware and

Ronald M. Whyte

On December 21, 1993 Michael S. Fields, Judge of the Municipal Court of the County of Monterey, moved for an order granting him leave to intervene in these proceedings for the limited purpose of objecting to the parties' proposed stipulation

and court order.¹ The motion to intervene is denied without prejudice.

A voting rights case challenges the election process rather than the individuals holding office. As government officials, . . . (judges) have no legally protectable interest in redistricting. Because it is a legislative action, judges play no part in creating or revising the election scheme and, therefore fail to meet the "real party in interest" test.

League of United Latin Amer. Citizens v. Clements, 884 F.2d 185, 188-189.

Judge Fields, therefore, has no right to intervene in his "official capacity". However, this order is without prejudice to a showing by Judge Fields that he has a "personal interest" which needs protection or that he meets the standard for permissive intervention. See generally: Clements, supra at 188-189 (discussion re personal interest and permissive intervention).

On January 13, 1994 the County and plaintiffs submitted a new stipulation and proposed order ("Parties' Second Stipulation and Order") in response to the court's order of December 22, 1993 declining to grant their application for approval of their original "Parties' Stipulation and Court Order." A status conference was held on January 14, 1994 and the parties agreed upon, and the court hereby orders, the following briefing schedule with respect to the new submittal:

January 18, 1994: Additional points and authorities supporting the new proposal due;

¹ Judge Fields' motion was actually filed in connection with the stipulation and order lodged with the court on November 22, 1993. However, Judge Fields' interest in intervening continues and he wishes to be heard with respect to the parties' newly submitted "Second Stipulation and Court Order".

January 28, 1994: Responses to proposal due; and
February 4, 1994: Reply by plaintiff and County due.

At the status conference no party object to the abbreviated filing deadlines proposed by the County and plaintiffs for the anticipated June 7, 1994 municipal court election. The court hereby stays the otherwise applicable dates and adopts the proposed abbreviated schedule. Such action is necessary to allow time for the review and approval of an election plan that complies with § 5 of the Voting Rights Act without unreasonably interfering with the ability to hold an election in June of 1994. The abbreviated schedule ordered is as follows:

Abbreviated Filing Deadlines
for

Judge of the Municipal Court Election
June 7, 1993

<u>DATE</u>	<u>ACTIVITY (ELECTIONS CODE)</u>
FEB 28 TO MAR 21	<u>SIGNATURE-IN-LIEU OF FILING FEE</u> Period during which candidates may circulate petitions in-lieu of paying filing fee. (E.C. 6494.1, 6554, 6555)
MAR 28	<u>SIGNATURE-IN-LIEU DEFICIENCIES</u> Deadline for Registrar to notify candidates of deficiencies in signature-in-lieu petitions. (E.C. 6554, 6555(b))
FEB 28 TO MAR 4	<u>DECLARATIONS OF INTENTION</u> Period candidates shall pay the appropriate filing fee and file the declaration of intention to become a candidate for office. (E.C. 6554,

Joint Appendix - 74

25301)

MAR 10 TO NOMINATION PERIOD
MAR 31

Period during which candidates declare candidacy and circulate nomination petitions. (E.C. 6490, 6494, 6494.1, 6550, 6554, 6555)

MAR 31 SUPPLEMENTAL SIGNATURE-IN-LIEU

Last day for candidates who filed signature-in-lieu petitions to submit supplemental petitions. (E.C. 6554, 6555b)

APR 1 TO EXTENSION OF NOMINATION PERIOD
APR 5

Nomination period is extended for five days if an incumbent has failed to file a written and signed declaration of intention. (E.C. 25305, 25500b)

APR 6 RANDOM ALPHABET DRAWING

Date on which Registrar of Voters would request Secretary of State to conduct a random alphabet drawing to determine order of candidates' names on the ballot. (E.C. 10217, 10217.5)

APR 11 JUDICIAL INCUMBENT (UNOPPOSED)
WRITE-IN PETITION

Last day to file a petition (100 qualified signatures required) indicating that a write-in campaign will be conducted in which only the incumbent has filed nomination papers. (E.C.

Joint Appendix - 75

25304)

APR 21 WRITE-IN CANDIDACY/NOMINATION
MAY 24 PERIOD

During this period, all write-in candidates must file their statement of write-in candidacy. (E.C. 7300-7304)

DATED: 1/21/94

/s/

RONALD M. WHYTE
United States District Judge
On Behalf of the Panel

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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

VICKY M. LOPEZ, CRESCENCIO
PADILLA, WILLIAM A. MELENDEZ,
JESSE G. SANCHEZ, and DAVID
SERENA,

Plaintiffs, (

v.

MONTEREY COUNTY, CALIFORNIA,
Defendant.

STATE OF CALIFORNIA,
Intervenor.

NO.
C-91-20559-
RMW (EAI)
(Voting Rights
Action/ Three
Judge Court)
OBJECTION OF
THE STATE OF
CALIFORNIA
TO SECOND
STIPULATION
AND
PROPOSED
ORDER

Pursuant to the order of this Court entered on
January 14, 1994, the State of California respectfully submits
these objections to the parties' second proposal on stipulation:

**THE STATE OF CALIFORNIA OBJECTS
TO THE ISSUANCE OF ANY ORDER
FROM THIS COURT THAT WOULD**

**RESULT IN THE CREATION OF
MUNICIPAL COURT ELECTION
DISTRICTS IN CONTRAVENTION OF
STATE LAW, ABSENT A SUFFICIENT
SHOWING THAT SUCH
CONTRAVENTION IS NECESSARY IN
ORDER TO ENSURE COMPLIANCE
WITH PARAMOUNT FEDERAL LAW**

With minor exceptions, the parties' second stipulation is substantively indistinguishable from their initial stipulation. In several respects, the parties seek the Court's assistance in accomplishing what would be prohibited under the California Constitution or under other state law. In only one case, have the parties made any effort to adduce facts to justify departure from state law.

**A. The State Objects To The Proposal's Failure
To Unify The Judges' Electoral Base And
Their Jurisdictional Base**

In their first stipulation, the parties proposed retention of the single municipal court judicial district with creation of seven "election areas" therein. According to the first stipulation:

"1. . . . All municipal court judges, regardless of residency or election area, will serve the entire county and can be assigned to any judicial assignment or any court location. Assignments will be made without regard to residency or election area.

2. . . . These election areas shall be used solely for the purpose of electing municipal court judges. These election areas shall not be used for any other purpose, including but not limited to, assignment of cases or court locations."

(Parties' Stipulation, p. 7.) Under the original plan, three of the "election areas" would be two-judge election areas; four, would

be one-judge election areas.

The parties' second proposal purports to be modeled on San Bernardino County's statutorily created municipal court district. (Cal. Gov. Code, § 73100 *et seq.*) Instead of seven "election areas," the parties would create four "divisions" which would constitute the "district" for purposes of article VI, section 16(b) of the California Constitution. However, as in the earlier proposal:

"1. . . . All municipal court judges, regardless of residency or division area, will serve the entire county and can be assigned to any judicial assignment or any court location. Assignments will be made without regard to residency or division area.

2. . . . These judicial divisions shall be used solely for the purpose of electing municipal court judges. These divisions shall not be used for any other purpose, including, but not limited to, the assignment of cases or court locations."

(Second Stipulation, p. 7.) Under this new plan, three of the divisions would be one-judge divisions; the fourth division would have seven judges.

Government Code section 73100 *et seq.* creates a single municipal court district for San Bernardino County with several "divisions" therein. Government Code section 73103 specifies that each "division" constitutes the "district" referred to in Cal. Const., art. VI, § 16(b), i.e., the "district" within which a municipal court judge must stand for election. (See also, Cal. Gov. Code, §§ 73394, 73581.)

The San Bernardino County scheme was challenged in 1989. The California Court of Appeal, in an unpublished opinion, reasoned that the only "constitutional" definition of a "district" is "an area designated in the manner prescribed by the Legislature with a population base of more than 40,000." (*Merriam v. Jacobsen*, 2 Civ. No. E006062 (Dec.

26, 1989) (hereafter, *Merriam*), p. 9.)¹ The Court of Appeal made these observations:

[T]he reason for requiring election by district was to ensure that the municipal and justice courts would remain community courts. The San Bernardino scheme furthers this objective by allowing voters within each division to elect the judges who will sit in that division. That judges are *temporarily* assigned to other divisions does not diminish the local accountability intended by the requirement of election by district any more than temporary assignments which occur in other courts. [4]

(*Merriam* at p. 10 (emphasis added) and n. 4 ["We note that the rules which were adopted by the majority of the judges in all the divisions allow only for temporary assignment of judges between divisions. Similarly, the transfer of cases requires the consent of the supervising judges of both divisions and allows the presiding judge of the district to act only in the event of a dispute."]))

The scheme was also challenged on the ground that it denied the right of suffrage, "in that [plaintiff] does not have the right to vote for those judges who will preside over cases in his division." Stated otherwise: "[T]he voters in the San Bernardino County Municipal Court District are denied equal protection because unlike voters in other districts, they are not entitled to vote for all the judges in the 'district'." (*Merriam* at p. 11.)

The appellate court rejected the contention because, in operation, each division is, in essence, a *de facto* municipal court district:

The judges within each division are required to be residents within that division and upon

1. A copy of the *Merriam* opinion is appended hereto for the Court's convenience.

election are permanently assigned to that division.

Furthermore, there has been no showing that the effectiveness of the franchise is diminished or diluted by the fact that the administrative functions for the de facto districts are handled on a uniform basis county-wide. While such might be a concern if judges were elected in one division yet assigned permanently to another, it is clear from the record that *transfers to other divisions occur only on a temporary basis to fill vacancies due to vacations or illnesses and there are no indications that such temporary assignments occur with any greater frequency or for longer durations than occur in other districts.* Accordingly, we do not find that the present scheme invades or infringes upon the right of suffrage.

(*Merriam* at p. 12 (emphasis added).)

In short, the Court of Appeal in *Merriam* was willing to sanction the San Bernardino County municipal court scheme only because each division was a *de facto* municipal court district, i.e., each division, in fact, encompassed a population of 40,000 at the time of creation, and judges would be permanently assigned to the division of their election. It seems clear that different facts would have led to a different result. (See *Bell v. Board of Supervisors*, 55 Cal.App.3d 629, 634-635 (1976) [legislation purporting to create municipal court electoral "divisions" with fewer than 40,000 residents was unconstitutional].)

Unlike the San Bernardino County scheme approved in *Merriam*, the plan proposed by the parties in this case does not provide any assurance that judges will be permanently assigned to the division within which they are

elected. Quite the contrary, as noted above, the proposed order specifically states:

All municipal court judges, regardless of residency or division area, will serve the entire county and can be assigned to any judicial assignment or any court location. Assignments will be made without regard to residency or division area.

Thus, the new proposed plan makes no effort to preserve the relationship between electoral base and jurisdictional base which exists in the San Bernardino County scheme, as implemented in practice, and which the Court of Appeal in *Merriam* found sufficient to bring the "division" scheme into compliance with article VI, section 16(b).

The parties have made no factual showing whatsoever that compliance with federal law compels the separation of judicial electoral base and jurisdictional base.² In the absence of such a showing by the parties that is determined

2. The County suggests that creation of separate municipal court districts would violate the Voting Rights Act by creating "separate but equal" judicial districts. (County's Memorandum in Support of Parties' Second Stipulation and Order, pp. 10-11.) Ironically, the County suggests that compliance with *Section 5* of the Voting Rights Act -- i.e., a return to the pre-1972 condition -- would violate *Section 2* of the Act.

The State is aware of no authority for the proposition that preserving a unity between electoral base and jurisdictional in judicial elections contravenes the letter or spirit of the Voting Rights Act. Indeed, there is substantial authority quite to the contrary. (See *League of United Latin Amer. Citizens v. Clements*, 999 F.2d 831, 869, 871-873 (5th Cir. 1993), cert. den. 62 U.S.L.W. 3471 (1994).)

by the Court to be sufficient, the proposal should be rejected.³

B. The State Objects To The Proposed Creation Of Judicial Election Districts Having Fewer Than 40,000 Residents

Merriam concluded that the San Bernardino County scheme satisfies section 5 of article VI, because each "division" met the 40,000+ population requirement for a municipal court district. (See Cal. Const., art. VI, § 5.) The plan proposed by the parties in this case is concededly deficient on this point. Plaintiffs admit that "[t]hree of the divisions under the Municipal Court Division Plan will each have less than 40,000 residents." (Plaintiffs' Memorandum in Support of Parties' Second Stipulation and Order (hereafter, Plaintiffs' Memorandum), pp. 3-4.) Again, no factual showing is made to justify departure from this minimum population requirement.

C. The State Objects To The Proposed Creation Of A Judicial Election District That Divides The City of Salinas, In The Absence Of

3. The State does not view its position in this litigation to be adversary to that of the County. The State believes it to be the County's obligation, as a political subdivision of the State (Cal. Gov. Code, § 23002), to defend the Constitution as the supreme declaration of the people's will in this State.

Accordingly, the State would defer to the County's determination as to the measure and quality of the showing by Plaintiffs that should be accepted by the Court as sufficient to justify the proposed departure from state law. Alternatively, the State would be satisfied if the County simply stipulated to the existence of *facts* that should justify departure from state law. However, the State does contend that, whatever evidence is proffered as justification for departing from state law, the sufficiency of such evidence to justify departure from state law should be determined by the Court.

Agreement By The County That Plaintiffs' Factual Justification For The Departure From State Law Is Accurate And Sufficient

The plan proposed by the parties also divides the City of Salinas (Plaintiffs' Memorandum, p. 4), in contravention of article VI, section 5 of the Constitution.⁴ A similar claim was raised in *Merriam* respecting division of the City of Highland; at the time of the appellate court decision, the city was located within two divisions of the municipal court district. The appellate court declined to resolve the issue for lack of sufficient evidence:

[I]t is not clear whether this present situation, assuming it exists, is the result of the county's action in establishing divisions or the result of the City of Highland's action in incorporating. The sole evidence before the court was that at the time of their creation each division met the constitutional requirements for a district and thus it must be assumed that Highland's location within two divisions occurred after the division boundaries were established.

(*Merriam* at p. 15 n. 6.)

In this instance, Plaintiffs do proffer a Voting Rights Act justification for splitting the City of Salinas. (Plaintiffs' Memorandum, pp. 5-12.) However, there is no indication that the County agrees with Plaintiffs' contention. As the State has indicated (see note 3, *supra*), a stipulation by the County as to the accuracy and sufficiency of Plaintiffs' factual

4. It is interesting to note Plaintiffs' contention that the County cannot return to the 1968 boundaries because those boundaries would split the Cities of Salinas, Marina, and Pacific Grove in violation of state law. (Plaintiffs' Memo, p. 4 n. 2.)

showing should be minimally required in order for the Court to determine whether sufficient justification exists for departing from state law.

D. The State Objects To The Parties' Proposal To Ignore Statutory Residency Requirements For Municipal Court Judges

Government Code section 71140 states that judges of the municipal court must be residents eligible to vote in the judicial district or city and county in which they are elected at least 54 days prior to the date of their election or appointment.⁵ Even in the so-called San Bernardino County Plan, after which the parties' proposal is modeled, requires judges to reside in the division of their election. (*Merriam* at p. 12.)

The parties' plan expressly permits judges to reside anywhere in the county, without regard to the division in which they must stand for election. No Voting Rights Act justification is offered for departing from the otherwise applicable residency requirement imposed by state law on municipal court judges in Monterey County.⁶

5. The Legislature has declared that residency in the county is sufficient for candidates to municipal courts in the Counties of Fresno, Humboldt, Stanislaus, San Mateo, Santa Clara, San Diego, Los Angeles and Orange. (Cal. Gov. Code, §§ 72240.2, 71140.3.)

6. It would appear that an incumbent's lack of residence in a division to which he might be assigned would not prevent the incumbent from automatically succeeding to the new office. (Cal. Gov. Code, § 71140.) However, in the absence of legislation, if an election in the new judicial election district is conducted in 1996 -- as would be required upon adoption of new election district scheme by the County (see Cal. Gov. Code, § 71080) -- then judges who would be required to stand for

CONCLUSION

For the reasons discussed herein, the State urges the Court to reject the Second Stipulation in the absence of (i) either a factual showing by the Plaintiffs in justification for each proposed departure from state law, or a stipulation by the parties to facts in justification for each proposed departure from state law; and (ii) a determination by this Court that there is sufficient evidentiary support (whether by proof or stipulation) to justify departure from state law in order to ensure compliance with a paramount federal law.

DATED: January 26, 1994

Respectfully submitted,
DANIEL E. LUNGREN
Attorney General of the
State of California
LINDA CABATIC, Supervising
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/s/
MANUEL M. MEDEIROS
Deputy Attorney General

Attorneys for Intervenor
State of California
(Declaration of Service Omitted in Printing)

election in that cycle will have to decide whether to take up residency in the new division if they do not already have their residence there.

Filed
FEB 23, 1994
Richard W. Wieking
Clerk, U.S. District Court
Northern District of California
San Jose

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

VICKY M. LOPEZ, CRESCENCIO
PADILLA, WILLIAM A. MELENDEZ,
JESSE G. SANCHEZ, and DAVID
SERENA,

Plaintiffs,

v.

MONTEREY COUNTY,
CALIFORNIA,

Defendant.

NO.
C-91-20559-
RMW (EAI)
ORDER
SCHEDULING
HEARING

PANEL: Circuit Judge Mary M. Schroeder and
District Judges James Ware and
Ronald M. Whyte

Counsel in the above-entitled action are hereby ordered to appear before the panel at the United States District Court, 280 South First Street, San Jose, California, Courtroom No. 1, 5th Floor, on February 25, 1994, at 2:30 p.m. for a hearing with respect to the second stipulation and proposed order. The court has questions concerning the issues which have been raised by the parties' briefs.

The panel has accepted and reviewed the amicus curiae brief filed on behalf of Governor Wilson. The Court also hereby grants Judge Fields's motion for limited intervention with

respect to his personal interest in the litigation.

DATED: February 23, 1994

/s/

RONALD M. WHYTE
United States District Judge
On Behalf of the Panel

Filed
MAR 1, 1994
Richard W. Wieking
Clerk, U.S. District Court
Northern District of California
San Jose

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**
VICKY M. LOPEZ, CRESCENCIO
PADILLA, WILLIAM A. MELENDEZ,
JESSE G. SANCHEZ, and DAVID
SERENA,
Plaintiffs,
v.
MONTEREY COUNTY,
CALIFORNIA
Defendant.

NO.
C 91 20559 RMW
(EAI)
ORDER
REQUIRING
SUBMISSION
OF ELECTION
PLAN FOR
PRECLEAR-
ANCE;
ALTERNATIVE
ORDER TO
SHOW CAUSE;
ORDER
ENJOINING
ELECTION
PENDING
PRECLEAR-
ANCE

BACKGROUND

In its order dated March 31, 1993, this court found that certain Monterey County municipal court judicial district consolidation ordinances, which were adopted between 1968 and 1983, required preclearance pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973 c, and that such preclearance had not been obtained. As a result of this court's

order, Monterey County filed a declaratory judgment action pursuant to Section 5 in the United States District Court for the District of Columbia seeking judicial approval of these consolidation ordinances. Monterey County v. United States of America, Civil Action No. 931639 (CRR) (D.C. Dist. Colum. 1993). By an order filed on September 7, 1993, that court permitted the plaintiffs in this action to intervene. Monterey County, then, stipulated with plaintiffs that it would be unable to establish that these ordinances did not have the effect of denying the right to vote to Latinos in Monterey County due to the retrogressive effect several of these ordinances had on Latino voting strength in Monterey County. Pursuant to the parties' stipulation, the action in the District Court for the District of Columbia was dismissed.

Monterey County and plaintiffs then agreed to the implementation of an election system for the election of municipal court judges to the Monterey County Municipal Court District and requested this court to order the County to adopt the system before preclearance. However, by order dated December 22, 1993 this court declined the request without prejudice because the court was not satisfied that a plan necessarily had to conflict with the California Constitution in order to comply with the Voting Rights Act. On January 13, 1994 the County and plaintiffs submitted a new stipulation and proposed order in response to the court's order of December 22, 1993. The new plan, in an attempt to comply with Section 5, also appears to conflict with certain provisions of the California Constitution and certain state laws.

ROLE OF THREE-JUDGE COURT

The role of the three-judge court entertaining an action under Section 5 of the Voting Rights Act is limited. In City of Lockhart v. United States, 460 U.S. 125, 129 n. 3 (1983), the Court describes that role:

[The three-judge court determines] (i) whether a change was covered by § 5, (ii) if the change was

covered, whether § 5's approval requirements were satisfied, and (iii) if the requirements were not satisfied, what remedy was appropriate....

Since this court determined in its March 31, 1993 order that (1) the County's consolidation ordinances were covered by § 5 and (2) Section 5's approval requirements were not satisfied, the question at this point is what remedy is appropriate. The remedy Section 5 contemplates is injunctive relief. Brooks v. State Bd. of Elections, 775 F.Supp. 1470, 1482 (S.D.Ga. 1989). In Perkins v. Matthews, 400 U.S. 379, 385 (1971) the Court pointed out what this court cannot do:

What is foreclosed to [the court] is what Congress expressly reserved for consideration by the District Court for the District of Columbia or the Attorney-General - the determination whether a covered change does or does not have the purpose or effect 'of denying or abridging the right to vote on account of race or color.'

The three-judge court has some limited discretion in fashioning the "appropriate remedy" to ensure that § 5's approval requirements are met. See e.g. Perkins v. Matthews, 400 U.S. 379, 396 (1971). In N.A.A.C.P. v. Hampton County Election Commission, 470 U.S. 166, 179 (1985) and Berry v. Dole, 438 U.S. 190, 192 (1978), the Supreme Court directed that appropriate relief under Section 5 should include an order allowing 30 days for the state to submit covered changes to the Attorney General for approval. In Berry v. Dole, the Court found that the District Court committed reversible error by not ordering the Peach County officials to seek preclearance of the voting change. Berry v. Dole, 438 U.S. 187, 193 (1978). Once the state has "successfully complied with the Section 5 approval requirements, private parties may enjoin the enforcement of the new enactment only in suits attacking its constitutionality; there is no further remedy provided by § 5." Allen v. State Board of Elections, 393 U.S. 544, 549-50 (1968).

CURRENT ISSUE BEFORE COURT

In the instant case, the parties acknowledge that any newly proposed election plan must be submitted for preclearance to the Attorney General or the United States District Court for the District of Columbia. The plaintiffs and County submit that this court should at this time order adoption of their newly proposed plan before it is submitted for preclearance, because suspension of certain California constitutional provisions and statutes may be necessary in order for the plan to meet the requirements of the Voting Rights Act. The State and Judge Fields object to the court's ordering adoption at this point, as they claim that an insufficient showing has been made that a plan cannot be fashioned without conflicting with state requirements.

FINDING BY COURT

The court is not satisfied based upon the showing made to date that a new election plan for the election of Municipal Court judges must conflict with the California Constitution or any California statute in order to comply with the Voting Rights Act. Therefore, it makes the order set forth below.

ORDER

Good cause appearing, the County of Monterey is hereby ordered to submit forthwith to the Attorney General or the United States District Court for the District of Columbia a new election plan for preclearance that complies with the Voting Rights Act and does not violate the state constitution or any law of the State of California. If the County is unable to submit a new election plan that complies with the Voting Rights Act without violating a provision of the California Constitution or a law of the State of California, it shall show cause on March 31, 1994 at 1:30 p.m. in this court as to why it cannot do so. The showing should identify the specific constitutional provision with which it cannot comply and the factual basis for its conclusion that it cannot comply. The factual basis should be supported by affidavit, stipulation of the parties, or other admissible evidence.

This factual showing should be filed and served on all

parties at least 15 days before the hearing on the order to show cause and each party should file at least 5 days before the hearing any objections it has to the County's factual showing and state any issue on which it believes an evidentiary hearing is required. The court will then decide at the hearing on March 31, 1994 whether an evidentiary hearing will be necessary and, if not, whether the County should be ordered to adopt a plan that conflicts with state law in order to have a plan that it can submit for Section 5 preclearance to the Attorney General or the United States District Court for the District of Columbia.

The County is hereby enjoined pending preclearance of a new election plan or further order of this court from holding an election for judges for the municipal court.

DATED: 2/28/94

/s/
RONALD M. WHYTE
UNITED STATES DISTRICT JUDGE
ON BEHALF OF THE PANEL

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
VICKY M. LOPEZ, *et al.*

Plaintiffs,

v.

MONTEREY COUNTY,
Defendants.

STATE OF CALIFORNIA,
Intervenor.

NO.
C-91-20559
RMW (EAI)
RESPONSE OF
STATE OF
CALIFORNIA
TO
STIPULATIONS
OF
PLAINTIFFS
AND
MONTEREY
COUNTY FOR
HEARING ON
ORDER TO
SHOW CAUSE

Date: March 31, 1994
Time: 1:30 p.m.
Courtroom: Circuit Judge Mary M. Schroeder,
District Judges James Ware and Ronald
M. Whyte

Intervenor State of California respectfully submits this response to the Stipulations entered into by the Plaintiffs and the County of Monterey for purposes of showing cause on March 31, 1994, as previously ordered by this Court.

1. The State will not object to the County's stipulation to the truth of the facts stated in respect to paragraphs 1, 3 through 9, inclusive, and 11 through 15, inclusive. Nothing herein should be construed, however, to reflect agreement by the State's concurrence in the County's stipulation.

2. With respect to paragraph 2 of the stipulation, the State would refer the Court to arguments in earlier submissions respecting the issue whether Section 5 of the Voting Rights Act compels the conduct of an election within 10 months of the creation of any new judicial election area, in contravention of section 71080(a) of the California Government Code. None of the stipulated facts appear to address this issue.

3. With respect to paragraph 10 of the stipulation, the State would point out that this issue -- insofar as it relates to elections of trial court judges that each exercise the whole of the judicial power within the district of their election -- is not settled, has not been briefed, and is, indeed, before the district court in *Trujillo v. State of California*, N.D.Cal. No. C-92-20465 (RMW). Should the Court accept this stipulation of a contested issue of law, the State wishes to make clear that it does not join in the County's stipulation.

Finally, the State observes that there has been no stipulation or submission of facts which would justify departure from the following state law requirements: (1) Candidates for municipal court must reside in the district of their election; (2) municipal court judges, like superior court judges, must stand election before all of the voters of the district over which they will preside as judges.

DATED: March 24, 1994

Respectfully submitted,

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Attorney General of the
State of California
LINDA CABATIC
Supervising Deputy
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/s/
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Attorneys for Intervenor State of California
(Declaration of Service Omitted in Printing)

Filed
MAY 3, 1993*
Richard W. Wieking
Clerk, U.S. District Court
Northern District of California
San Jose

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

VICKY M. LOPEZ, CRESCENCIO
PADILLA, WILLIAM A. MELENDEZ,
JESSE G. SANCHEZ, and DAVID
SERENA,

Plaintiffs,

v.

MONTEREY COUNTY,
CALIFORNIA,

Defendant.

NO.
C 91 20559
RMW (EAI)
TENTATIVE
ORDER
REQUIRING
COUNTY TO
HOLD
NOVEMBER
ELECTIONS
PURSUANT TO
AN INTERIM
PLAN;
AND RE
MOTION
TO VACATE
OR
SHORTEN
TERMS

BACKGROUND

In its order dated March 31, 1993, this court found that certain Monterey County municipal court judicial district consolidation ordinances, which were adopted between 1968 and 1983, required preclearance pursuant to Section 5 of the

*(Please note that year is incorrect. The year should be 1994.)

Voting Rights Act, 42 U.S.C. § 1973 c, and that such preclearance had not been obtained. As a result of this court's order, Monterey County filed a declaratory judgment action pursuant to Section 5 in the United States District Court for the District of Columbia seeking judicial approval of these consolidation ordinances. Monterey County v. United States of America, Civil Action No. 93-1639 (CRR) (D.C. Dist. Colum. 1993). By an order filed on September 7, 1993, that court permitted the plaintiffs in this action to intervene. Monterey County, then, stipulated with plaintiffs that it would be unable to establish that these ordinances did not have the effect of denying the right to vote to Latinos in Monterey County due to the retrogressive effect several of these ordinances had on Latino voting strength in Monterey County. Pursuant to the parties' stipulation, the action in the District Court for the District of Columbia was dismissed.

Monterey County and plaintiffs then agreed to the implementation of an election system for the election of municipal court judges to the Monterey County Municipal Court District and requested this court to order the County of Monterey to adopt the system before preclearance. However, by order dated December 22, 1993 this court declined the request without prejudice because the court was not satisfied that a plan necessarily had to conflict with the California Constitution in order to comply with the Voting Rights Act. On January 13, 1994 the County of Monterey and plaintiffs submitted a new stipulation and proposed order in response to the court's order of December 22, 1993. The new plan also conflicted with certain provisions of the California Constitution and certain state laws.

On March 1, 1994, this court ordered the County of Monterey to submit to the Attorney General or the United States District Court for the District of Columbia a new election plan for preclearance that complied with the Voting Rights Act and did not violate the state constitution or any law of the State of

California. The court further ordered that if Monterey County were unable to submit a new election plan that complied with the Voting Rights Act without violating a provision of the California Constitution or a law of the State of California, it should show cause why it could not do so.

On March 16, Monterey County and plaintiffs submitted stipulations that included a list of 10 proposals and a citation to the state law violated by each respective plan. Stipulation 15 states that "[t]he Board of Supervisors is unable to devise or prepare any plan for the election of municipal court judges in Monterey County that does not conflict with at least one state law and still comply with the Voting Rights Act."

ANALYSIS

Redistricting and reapportionment are " 'primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court.' " Voinovich v. Quilter, ___ U.S. ___, 113 S.Ct. 1149, 1157 (1993) (citation omitted). As the Court stated in Wise v. Lipscomb, 437 U.S. 535, 540 (1978):

Legislative bodies should not leave their reapportionment tasks to the federal courts; but when those with legislative responsibilities do not respond, or the imminence of a state election makes it impractical for them to do so, it becomes the 'unwelcome obligation,' Connor v. Finch, *supra*, 431 U.S. at [407], 415, 97 S.Ct. at [1828], 1833 [1977], of the federal court to devise and impose a reapportionment plan pending later legislative action.

The three-judge court has some limited discretion in fashioning the "appropriate remedy" to ensure that Section 5's approval requirements are met. See e.g. Perkins v. Matthews, 400 U.S. 379, 396 (1971).

In the instant case, the County of Monterey has failed to devise and preclear a plan that conforms with both the Voting

Rights Act and with state law. Because the interests of the voters mandate holding elections in November, the court will enter an interim reapportionment order that will allow the elections to go forward pending legislative action. For the reasons set forth below, the court orders that municipal court elections be held in November for the Monterey County Municipal Court District which encompasses the entire County of Monterey and which has ten judges. Cal. Gov't Code §§ 73560 and 73562. The voting for each judicial office up for election will be County-wide. Cal. Const. art. VI, § 16(b). In other words for this interim plan there will be congruity of electoral and jurisdictional base as required by the California Constitution. The election will be for the offices of those judges whose terms expire on or before January of 1995. See Cal. Gov't. Code §§ 71141 and 71145. However, the terms of the judges elected pursuant to the interim plan will expire on the first Monday of January of 1996.

The court is cognizant of the fact that the interim plan fails to fully address plaintiffs and Monterey County's concerns or remedy the apparent retrogressive effect several of the consolidation ordinances have on Latino voting strength in Monterey County. It does, however, provide a mechanism to ensure the citizens' right to elect judges while an appropriate legislative solution to the problem is devised. Moreover, the shortening of terms mandates that the County of Monterey move expeditiously to develop and preclear a plan that complies with the Voting Rights Act and the constitutions of the United States and the State of California. A district court, faced with the evils of either disrupting state government or ordering interim relief that falls short of constitutional standards must sometimes adopt, on a temporary basis, an election system that may violate the constitution or federal law. Watkins v. Mabius, 771 F.Supp. 789 (S.D.Miss. 1991). In Kilgarlin v. Hill, 386 U.S. 120, 121 (1967), the Supreme Court stated: "We affirm the District Court's action in permitting the 1966 election to proceed under

H.B. 195 although constitutionally infirm in certain respects." In Upham v. Seamon, 456 U.S. 37, 44 (1982), the Court states that it has "authorized District Courts to order or to permit elections to be held pursuant to apportionment plans that do not in all respects measure up to the legal requirements, even constitutional requirements." In those instances the Court has cited "necessity" as the motivating factor. *Id.* Faced with the exigencies of imminent elections and the lack of viable options, the court may utilize an interim plan that may be legally infirm pending Monterey County's adoption and preclearance of a plan which complies with the Voting Rights Act and the United States and California constitutions.

This court has considered other options such as plaintiffs and Monterey County's request that the court authorize Monterey County to submit for preclearance either a permanent or temporary plan that will violate state constitutional provisions or statutes. Plaintiffs and Monterey County urge the court to authorize Monterey County to adopt a plan that permits a municipal court district to have less than 40,000 residents in violation of Article VI, Section 5 of the California Constitution, to divide the city of Salinas into two municipal court districts in violation of Government Code Section 71040, and to waive the state requirement of congruity of electoral base and jurisdictional base in violation of Article VI, Section 16(b) of the California Constitution. The state argues that an abdication of the requirement of congruence between jurisdictional and electoral base would pose serious problems by depriving people of voting rights. The state urges that, in any interim or permanent solution, the court not suspend the state law requirements that municipal court judges stand election before all of the voters in the district over which they will preside and candidates for municipal court reside in the district of their election. The court is satisfied that the adoption of a proposed plan as urged by Monterey County and plaintiffs as an interim solution would alter the structure embodied in the California constitution and

statutes, would do too much violence to legislative and state interests, and would create more problems than it solves. In fashioning a redistricting plan "or in choosing among plans, district courts should not ... 'intrude upon state policy any more than necessary.'" Upham v. Seamon, 456 U.S. 35, 42 (1982) (citation omitted).

The court's adoption of an interim plan with shortened terms reflects the urgency with which this court views Monterey County's responsibility to develop and preclear a plan that complies with the Voting Rights Act and the constitutions of the United States and the state of California. Monterey County is urged to seek any legislative changes or changes in the administrative structure of its courts that may be necessary in order to expeditiously adopt and preclear a viable plan.

ORDER

Good cause appearing, Monterey County is hereby ordered to hold municipal court elections in November for the Monterey Municipal Court District. The voting for each judicial seat up for election will be county-wide. The terms of the judges who are elected will expire on the first Monday of January of 1996. The court anticipates and expects that Monterey County will have in place for the next general election a plan that complies with the Voting Rights Act, that does not violate the constitution of the United States or the state of California and that is precleared by the Attorney General or the United States District Court for the District of Columbia.

The motion by plaintiff to vacate judicial appointments or shorten terms is denied except to the extent that the court by this order has determined that the terms of those elected in November should be shortened. Any party may file an objection or other comment or response to this tentative ruling by a brief not to exceed 10 pages in length by May 13, 1994. The matter will be deemed submitted as of that date. No further hearing will be held absent notice from the court that it desires to hear further oral argument.

DATED: 5/3/94

/s/
RONALD M. WHYTE
United States District Judge
On Behalf of the Panel

Filed
JUN 2, 1994
Richard W. Wieking
Clerk, U.S. District Court
Northern District of California
San Jose

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

VICKY M. LOPEZ, CRESCENCIO
PADILLA, WILLIAM A. MELENDEZ,
JESSE G. SANCHEZ, and DAVID
SERENA,
Plaintiffs,
v.

MONTEREY COUNTY,
CALIFORNIA,
Defendant.

NO.
C 91 20559 RMW
(EAI)
ORDER
GRANTING
UNITED
STATES'
MOTION TO
PARTICIPATE
AS AMICUS
CURIAE;
ENJOINING
ELECTIONS
PENDING
PRECLEAR-
ANCE; AND
DENYING
MOTION TO
VACATE
JUDICIAL
APPOINT-
MENTS OR
SHORTEN
TERMS

BACKGROUND

In its order dated March 31, 1993, this court found that

certain Monterey County municipal court judicial district consolidation ordinances, which were adopted between 1968 and 1983, required preclearance pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973 c, and that such preclearance had not been obtained. As a result of this court's order, Monterey County filed a declaratory judgment action pursuant to Section 5 in the United States District Court for the District of Columbia seeking judicial approval of these consolidation ordinances. Monterey County v. United States of America, Civil Action No. 93-1639 (CRR) (D.C. Dist. Colum. 1993). By an order filed on September 7, 1993, that court permitted the plaintiffs in this action to intervene. Monterey County then stipulated with plaintiffs that it would be unable to establish that these ordinances did not have the effect of denying the right to vote to Latinos in Monterey County due to the retrogressive effect several of these ordinances had on Latino voting strength in Monterey County. Pursuant to the parties' stipulation, the action in the District Court for the District of Columbia was dismissed.

Monterey County and plaintiffs then agreed to the implementation of an election system for the election of municipal court judges to the Monterey County Municipal Court District and requested this court to order the County of Monterey to adopt the system before preclearance. However, by order dated December 22, 1993, this court declined the request without prejudice because the court was not satisfied that a plan necessarily had to conflict with the California Constitution in order to comply with the Voting Rights Act. On January 13, 1994 the County of Monterey and plaintiffs submitted a new stipulation and proposed order in response to the court's order of December 22, 1993. The new plan also conflicted with certain provisions of the California Constitution and certain state laws.

On March 1, 1994, this court ordered the County of Monterey to submit to the Attorney General or the United States

District Court for the District of Columbia a new election plan for preclearance that complied with the Voting Rights Act and did not violate the state constitution or any law of the State of California. The court further ordered that if Monterey County were unable to submit a new election plan that complied with the Voting Rights Act without violating a provision of the California Constitution or a law of the State of California, it should show cause why it could not do so.

On March 16, 1994, in response to the order to show cause, Monterey County and plaintiffs submitted stipulations that included a list of 10 proposals and a citation to the state law violated by each respective plan. Stipulation 15 states that "[t]he Board of Supervisors is unable to devise or prepare any plan for the election of municipal court judges in Monterey County that does not conflict with at least one state law and still comply (sic) with the Voting Rights Act."

On May 3, 1994, this court issued a tentative order directing a county-wide election in November based upon an interim reapportionment plan. The court recognized that the interim plan, which was, in effect, the voting system implemented by the unprecleared ordinances, would not remedy the apparent discriminatory effect that the unprecleared voting system had on Latino voters. However, the court believed the interim plan, which called for shortened terms of those judges elected, would preserve the citizens' right to elect judges while a permanent legislative solution was being developed and a plan precleared. The court also felt that its interim plan created fewer problems than any of the solutions offered by the parties. The court allowed the parties until May 13, 1994 to file any comments or objections to its tentative order. All parties, except the State, filed responses raising questions about or objecting to the tentative order.

On May 13, 1994 the United States filed a motion for leave to participate as amicus curiae which the court hereby grants.

For the reasons set forth below, the court vacates its tentative order and hereby issues an injunction barring any elections for municipal court judges pending preclearance of a new voting system or further order of this court.

II. ANALYSIS

In its tentative order of May 3, 1994, the court concluded that the interests of the voters mandated holding an interim election under an unprecleared system pending Monterey County's adoption and preclearance of a plan that complies with state and federal law. The court is now convinced that permitting the voters to cast ballots under a plan that has not been precleared and that has an apparent retrogressive effect on Latino voting strength would not be in the best interest of the voters.

The Supreme Court has indicated that the three-judge court has limited discretion in fashioning an appropriate remedy in Section 5 cases. *See e.g., Perkins v. Matthews*, 400 U.S. 379, 441 (1971). Section 5 contemplates the remedy of injunctive relief. *Brooks v. State Bd. of Elections*, 775 F.Supp. 1470, 1482 (S.D.Ga. 1989). In the instant case, an injunction pending preclearance is the most appropriate remedy.

Redistricting and reapportionment are " 'primarily the duty and responsibility of the State through its legislative or other body, rather than of a federal court.' " *Voinovich v. Quilter*, ___ U.S. ___, 113 S.Ct. 1149, 1157 (1993) (citation omitted). In the instant case, the County of Monterey has failed to devise and preclear a plan that conforms with both the Voting Rights Act and with state law. The very purpose of section 5 is to require preclearance before changes can be put into effect, and to avoid using litigation by voters as the mechanism for testing changes in voting laws. *See e.g., McCain v. Lybrand*, 465 U.S. 236, 243-44 (1984).

This court has considered the possibility of ordering an election in accordance with one of the plans proposed by the County and the plaintiffs. Under the plan preferred by them, one

of the municipal court districts would have less than 40,000 residents in violation of Article VI, Section 5 of the California Constitution, the City of Salinas would be divided into two districts in violation of Government Code Section 71040, and there would not be congruity of electoral base and jurisdictional base as required by Article VI, Section 16(b) of the California Constitution. The State objects to such a plan and argues that an elimination of the requirement of congruence between jurisdictional and electoral base would pose serious problems by depriving people of voting rights. The State urges that, in any interim or permanent solution, the court not suspend the state law requirements that municipal court judges stand election before all of the voters in the district over which they will preside and candidates for municipal court reside in the district of their election.

The court is satisfied that the adoption of a plan as currently proposed by Monterey County and plaintiffs as an interim solution would alter the structure embodied in the California constitution and statutes, would do too much violence to legislative and state interests, and would create more problems than it solves. In fashioning a redistricting plan "or in choosing among plans, district courts should not ... 'intrude upon state policy any more than necessary.' " *Upham v. Seamon*, 456 U.S. 35, 42 (1982) (citation omitted). In its amicus brief, the United States additionally proposed, as a possible option, implementation, on an interim basis, of the election scheme that was in effect for municipal judges on November 1, 1968. However, as plaintiffs and the County have noted, such an alternative is not a workable interim solution.

The court believes that the county and the plaintiffs have acted in good faith in attempting to develop an appropriate plan, but the State has apparently not yet been involved in the process. The court recognizes that the task of developing a plan is a difficult one that will require plaintiffs, the County, and the State to work together. It also appears that a solution may require

state legislative action. The United States, through its amicus brief, has now volunteered to assist the parties in devising a system that complies with the Voting Rights Act. Therefore, the court concludes that the most appropriate remedy at this point is to enjoin an election pending preclearance of an appropriate redistricting plan and to allow the parties limited additional time to reach and implement a solution. If, however, the parties do not move forward expeditiously or are unable to reach a legislative solution, the court will have to take more drastic action including possible implementation of a judicially created redistricting plan. However, given the complexity of the problem, the fact that reapportionment tasks are best left to the legislature, and the fact that legislative solutions necessarily take some time, the court concludes that enjoining an election prior to preclearance is the most appropriate remedy at this time.

The court wishes to underscore the urgency with which it views Monterey County's responsibility to develop and preclear a plan that complies with state and federal law. The County is urged to promptly seek any legislative changes or changes in the administrative structure of its courts that may be necessary in order to expeditiously adopt and preclear a viable plan. The court has avoided developing its own plan only because it is convinced that the County has not neglected its legislative responsibilities and is committed to working with plaintiffs and the State to fulfill its reapportionment obligation.

In its motion for leave to participate amicus curiae, the United States has offered "to assist the parties in the development of an appropriate remedy if the court believes that such assistance would be beneficial." The State is currently a party to these proceedings. The court finds that it would be beneficial for the State and the United States to assist the County in the development and expedited preclearance of a plan that will comply with the Voting Rights Act and with federal and California state law (or at least minimally intrude on state

policy).¹

ORDER

1. Monterey County is ordered to develop a plan for the election of municipal court judges which complies with the Voting Rights Act and intrudes on state policy no more than necessary. The County shall take any steps required to obtain changes in existing state law or county ordinances. The State shall participate and assist in the County's development of such a plan.

2. Monterey County is hereby enjoined from holding elections for municipal court judges pending adoption and preclearance of a new plan. The court requests the cooperation and the assistance of the United States in the development and preclearance process.

3. The court orders the parties to appear at a status conference on November 3 at 1:30 p.m. to report on their progress at which time the court will determine whether sufficient steps have been taken to justify continuing the injunction in effect or whether some other remedy needs to be fashioned. The parties should be prepared to inform the court of measures taken to effect any legislative changes or changes in the County's administrative structure that may be necessary, of any alternative plans that have been developed, and of a timetable for the implementation and preclearance of a plan.

The motion by plaintiffs to vacate judicial appointments or shorten terms is denied. The governor's appointment powers are not the subject of the Section 5 proceedings and the orderly administration of justice requires that vacancies be appropriately filled. Any judges appointed will have to face election under the new redistricting plan.

¹ The court has not foreclosed the possibility of authorizing a plan for preclearance that violates existing state law, if the court is satisfied that intrusion upon state policy is necessary.

DATED: 6/1/94

/s/
RONALD M. WHYTE
United States District Judge
On Behalf of the Panel

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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**
VICKY M. LOPEZ, et al.,

Plaintiffs,

v.

MONTEREY COUNTY, CALIFORNIA,
Defendant.

STATE OF CALIFORNIA; MICHAEL
FIELDS

Intervenor-Defendants.

NO.
C-91-20559
RMW (eai)

SUPPLE-
MENTAL
MEMO-
RANDUM
OF POINTS
AND
AUTHORITIES

Pursuant to the Court's order of November 3, 1994, Intervenor State of California respectfully submits the following memorandum of law of points and authorities:

INTRODUCTION

In 1971, Monterey County became subject to the "preclearance" requirements of Section 5 of the Voting Rights Act. (42 U.S.C. § 1973c.) That requirement applied to changes in any voting practice that was in place as of November 1, 1968.

(See 28 C.F.R. Part 51 Appendix.) According to this Court's decision on the merits, the judicial district consolidation efforts which required preclearance began in 1972 with the adoption of Monterey County Ordinance No. 1852. (Order Granting Plaintiffs' Motion for Partial Summary Judgment and Denying Defendant's Motions, p. 3.) Those efforts continued until 1983, culminating in the adoption of Ordinance No. 2930, which consolidated the County's remaining judicial districts into the single Monterey County Municipal Court District. (*Ibid.*) In September 1991, plaintiffs brought an action under Section 5 of the Voting Rights Act seeking to unravel two decades of systematic changes in the municipal court districting scheme for Monterey County.

The Court granted plaintiffs' motion for summary judgment, finding that "the County ordinances disputed herein constitute a change in voting procedure different from that in force or effect on November 1, 1968." (Order dated April 1, 1993.) It now devolves upon the County either to return to the status quo ante (*cf.*, Brooks v. State Bd. of Elections, 775 F.Supp. 1470, 1480 (S.D. Ga. 1989)), or to adopt a municipal court election plan that will satisfy Section 5 preclearance standards when compared with earlier election arrangements.

The County now complains, however, that, because of significant changes in California law since 1972, it is not now feasible to return to the status quo ante.¹ The County also contends that California constitutional requirements render it impossible to create municipal court election plans that will

¹ It appears that the County did not assert a bar of laches and did not contend that plaintiffs' action was barred by a statute of limitations. Nevertheless, undue passage of time is a factor that may properly be considered by the Court in fashioning an appropriate temporary remedy. (Lopez v. Hale County, Texas, 797 F.Supp. 547 (N.D. Tex. 1992), *aff'd*, 113 S.Ct. 954.)

satisfy preclearance requirements.²

The County represents that it has unsuccessfully sought changes in the state constitution in order to relieve one or the other of two perceived obstacles to preclearance: (1) The state Constitution's prohibition against dividing cities between

² The State takes no position on the County's contentions. Any remedial plan adopted by the Legislature cannot have the effect of segregating voters on the basis of race more than is absolutely necessary to accomplish nonretrogression. (Shaw v. Reno, ___ U.S. ___, 113 S.Ct. 2816, 2831 (1993) ["A reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the [jurisdiction] went beyond what was reasonably necessary to avoid retrogression."]) Absent satisfaction of the criteria set out in Thornburgh v. Gingles, 478 U.S. 30 (1986), the failure to maximize minority voting strength does not establish a Section 2 violation. (Johnson v. DeGrandy, ___ U.S. ___, 62 U.S.L.W. 4755, 4759-4761 (1994); *see also*, Grove v. Emison, 507 U.S. ___, 113 S.Ct. 1075, 1076 (1993) ["Unless these points are established, there neither has been a wrong nor can there be a remedy"].) Accordingly, if the County is here attempting to fashion a remedy for a Section 2 violation in the absence of any determination that such a violation occurred, then the County is seeking to accomplish more than is necessary to satisfy Section 5.

It appears that no plans have yet been submitted to the Attorney General for preclearance, and if the Attorney General has informally advised the County that she would object to some particular districting arrangement or arrangements if offered, certainly the Court has not been advised of that fact. Neither has the Court been advised of any election plans that may have been discussed informally with the Department of Justice, or of the Attorney General's reasoning in advising that a proposal would be rejected if offered.

municipal court districts (Cal. Const., art. VI, § 5); and (2) the state Constitution's mandate that municipal court judges stand election before the whole electorate of their district (Cal. Const., art. VI, § 16(b)). (Cf., Cal. Const., art. VI, § 5(b) [permitting City of San Diego to be divided into more than one municipal court district at Legislature's discretion].) Nevertheless, the County represents that it intends to proceed to adopt a plan for preclearance, but asks the Court to set "ground rules."

It is not the responsibility of this Court to decide whether or not any election scheme adopted by the County would satisfy preclearance standards; that responsibility is lodged exclusively with the Attorney General or the United States District Court of the District of Columbia. (42 U.S.C. § 1973c; see *Brooks v. State Bd. of Elections*, 775 F.Supp. 1470 (S.D. Ga. 1989), *aff'd*, 498 U.S. 916 [court did not have the power to "equitably preclear" any changes in voting procedures; burden was on covered jurisdiction to seek preclearance].) Accordingly, it would be inappropriate for this Court to impose "ground rules" in the sense of relieving the County from state constitutional restrictions in the fashioning of a municipal court plan, on the assumption that a plan adopted pursuant to the "ground rules" would satisfy preclearance standards.³

This Court's responsibility is limited to providing such temporary relief as may be necessary in order to permit elections to be properly conducted for municipal court judges pending preclearance of a legislatively adopted plan. It is in that context, therefore, that the Court must consider the two

³ Furthermore, there is no basis whatsoever for the Court to relieve the County from any of the state Constitution's restrictions. Neither of the constitutional restrictions assertedly burdening the County has been determined to violate the United States Constitution or Section 2 of the Voting Rights Act.

alternative proposals submitted by the County.⁴

Alternative No. 1 would have the Court create two municipal court districts, dividing the City of Salinas between the two districts in violation of article VI, section 5, of the California Constitution. Alternative No. 2 would have the court create "election areas" within a single municipal court district. Judges would be elected from an "election area" within the municipal court district, but would serve throughout Monterey County. (Cf., *Martin v. Mabus*, 700 F.Supp. 327 (S.D. Miss. 1988).) Alternative No. 2 is the practical and administrative preference of the County. The United States, as *amicus curiae*, also takes the position that Alternative No. 2 is the lesser intrusive option, because it would not require the creation of two municipal court districts.

I
ELECTION AREA "SUBDISTRICTING"
WOULD UNCONSTITUTIONALLY
DISFRANCHISE VOTERS OF THE
MONTEREY COUNTY MUNICIPAL
COURT DISTRICT ON ACCOUNT OF
RACE

A. Alternative No. 2 Is Presumptively Invalid
And Can Only Be Justified By Proof Of A
Compelling State Interest

The California Constitution guarantees to residents of a trial court judicial district the right to vote for the judge or judges of that district. (Cal. Const., art. VI, § 16(b);

⁴ Although the County requested that the Court order an election in June 1995, the County has submitted no other proposals for temporary relief in order that such an election might take place, e.g., shortened terms of office. All of the County's proposals anticipate the architecture of a final and permanent election plan which the County would submit to the Attorney General for preclearance.

Koski v. James, 47 Cal.App.3d 349, 354 (1975).) The County's Alternative No. 2 would have the Court deny residents of the Monterey County Municipal Court District the right to vote for some of their judges in that district. (Cf., League of United Latin American Citizens v. Clements, 999 F.2d 831, 873 (5th Cir. 1993), cert. denied, ___ U.S. ___, 114 S.Ct. 878 (1994) ["Subdistricting would partially disenfranchise citizens to whom all district judges in a county are now accountable"]; Southern Christian Leadership Conference v. Evans, 785 F.Supp. 1469, 1478-1479 (M.D. Ala. 1992) [electoral "subdistricts" implicate the right to vote and significant state interests].)⁵ This, of course, is no small matter: "The right to vote freely for the candidate of one's choice is of the essence of a democratic society." (Reynolds v. Sims, 377 U.S. 533, 555 (1964)).⁶

⁵ The Court will recall that the only reason the Voting Rights Act applies at all to trial court judges is because the Supreme Court has ruled that trial court judges are to be considered "representatives" within the meaning of Section 2 of the Voting Rights Act. (Houston Lawyers' Assn. v. Attorney General, 501 U.S. ___, 115 L.Ed.2d 379, 386 (1991).) While Alternative 2 affords every elector in Monterey County the opportunity to elect one or some of his or her representatives on the municipal court bench, the plan is expressly intended to deny every elector the opportunity to elect all of his or her representatives. To the extent that electors, because of their race, are deprived of the opportunity to elect one or more of their representatives, Alternative 2, on its face, would seem to contravene both the letter and the spirit of 42 U.S.C. § 1973(a).

⁶ The State has already expressed to the Court its concern that, in addition to implicating Equal Protection and Fifteenth Amendment guarantees, Alternative 2 would adversely affect the State's interest in what the Fifth Circuit calls

Alternative No. 2 cannot be equated with mere "race conscious" legislative-district line drawing. In the latter case, race might be taken into consideration as a factor in the drawing of the district lines, along with other traditional districting factors. In such a case, segregation of voters on the basis of race is incidental to a race-neutral purpose, viz., the drawing of legislative district lines. Here, however, the purpose of the line drawing altogether is hardly race-neutral. There already exists an electoral district for the purpose of electing municipal court judges. Segregation of voters into "election

"linkage," i.e., preserving the contiguity between electoral base and jurisdictional base. The fact that municipal court judges may sit by occasional, ad hoc assignment on cases in jurisdictions from which they were not elected does not detract from the significance of the State's interest in this regard. (See League of United Latin American Citizens v. Clement, *supra*, 999 F.2d at 874.)

Although one district court has suggested that "linkage" is not necessarily an important state interest (Cousin v. McWherter, 840 F.Supp. 1210 (E.D. Tenn. 1994)), others appear to disagree. (See, Southern Christian Leadership Conference, *supra*, 785 F.Supp. at 1478.) The Fifth Circuit notes that virtually all of the states that provide for the election of their trial court judges employ district-wide elections. (League of United Latin American Citizens, *supra*, at 872 and n. 33.) As that court observed: "The overwhelming preservation of linkage in states that elect their trial court judges demonstrates that district-wide elections are integral to the judicial office and not simply another electoral alternative." (*Ibid.*) Indeed, in light of the Fifth Circuit's sweeping recognition of "linkage" as a universally recognized state interest, Martin v. Mabus, *supra* 700 F.Supp. 327, is hardly weighty precedent any longer for subdistricting as an appropriate remedy in judicial Voting Rights Act cases.

areas" on the basis of race is the very raison d'être of Alternative No. 2 -- as a race-based alternative to the existing system.⁷

Because racial segregation is the sole motivating purpose for creation of "election areas" it is per se constitutionally suspect. Equal Protection guarantees of strict scrutiny "apply not only to legislation that contains explicit racial distinctions, but also to those 'rare' statutes that, although race-neutral, are, on their face, 'unexplainable on grounds other than race.'" (Shaw v. Reno, supra, 113 S.Ct. at 2825.) The Fourteenth Amendment, therefore, requires "extraordinary justification" for subdistricting of judicial elections. (Personnel

⁷Nor can Alternative 2 be equated with the substitution of election districts for an "at large" election scheme. The Fifth Circuit observed: "Unlike legislators or even appellate judges, who make decisions in groups, each district judge holds a single member office and acts alone. When collegial bodies are involved, all citizens continue to elect at least one person involved in making a particular decision. While subdistricting for multimember offices can enhance minority influence because members from minority subdistricts participate in and influence all of the decisions of the larger body, subdistricting for single-member district court judgeships would leave minority voters with no electoral influence over the majority of judges in each county." (League of United Latin American Citizens v. Clements, supra, 999 F.2d at 9873.) In this regard, the Supreme Court has warned: "Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters -- a goal that the Fourteenth and Fifteenth Amendments embody." (Shaw v. Reno, supra, 113 S.Ct. at 2832.) Indeed, there is "a certain irony in using the Voting Rights Act to deny citizens the right to select public officials of their choice." (Brooks v. State Bd. of Education, 848 F.Supp. 1548, 1568 (S.D. Ga. 1994); see note 6, supra.)

Administrator of Massachusetts v. Feeney, 442 U.S. 256, 272 (1979), quoted in, Shaw v. Reno, supra, 113 S.Ct. at 2816.)

B. Alternative No. 2 is Not A Narrowly-Tailored Temporary Remedy For A Section 5 Violation

The State respectfully submits that there is no sufficient justification for a race-based disfranchisement scheme here. It cannot be overemphasized that this is not a case arising under Section 2 of the Voting Rights Act; this case arises under Section 5 of that Act.⁸ The mere fact that the existing municipal court election scheme was not precleared does not mean that the scheme is necessarily subject to vote dilution challenge under Section 2. (Holder v. Hall, ___ U.S. ___, 62 U.S.L.W. 4728, 4731 (1994).) Retrogression, the inquiry for purposes of preclearance, is not the inquiry of Section 2. (Ibid.; see also, Johnson v. DeGrandy, ___ U.S. ___, 62 U.S.L.W. 4755, 4759-4761 (1994) [failure to maximize minority voting strength, standing alone, does not necessarily establish a Section 2 violation].) Indeed, the question whether the county-wide scheme for electing trial court judges in Monterey County violates Section 2 of the Voting Rights Act is presently pending before this Court in another case: Trujillo v. State of California, No. C-92-20465 RMW (EAI).

In the absence of proof that the existing county-wide system for electing municipal court judges is unconstitutional or violative of Section 2 of the Voting Rights Act -- an issue not presented by these proceedings -- there is no justification whatsoever for disfranchising voters on the basis of race as a temporary remedy pending Section 5 preclearance of an election scheme fashioned by the County. (See, Brooks v.

⁸ The State does not concede that race-based subdistricting of judicial districts would be an appropriate remedy even in a Section 2 case. (See League of United Latin American Citizens v. Clements, supra, 999 F.2d 831.)

State Bd. of Elections, *supra*, 848 F.Supp. at 1567.) The fact that Alternative No. 2, if adopted by the County, might satisfy Section 5's preclearance standards, does not mean that the plan is immune from constitutional challenge. No Section 5 decision of the Supreme Court gives jurisdictions *carte blanche* to engage in racial gerrymandering in the name of nonretrogression. (*Shaw v. Reno*, *supra*, 113 S.Ct. at 2831.) "A reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the [jurisdiction] went beyond what was reasonably necessary to avoid retrogression." (*Ibid.*)

In this case, the County has proffered only one other alternative to avoid retrogression, viz. the creation of more than one municipal district, dividing the City of Salinas between two districts. While this may not be the County's preferred alternative, it is an alternative that does not deny voters the opportunity to elect all of the judges in the district wherein the voter resides. Moreover, no disfranchisement is effected on account of race.⁹

II

THE COURT NEED NOT ACCEPT THE ALTERNATIVES PRESENTED BY THE COUNTY

The task before this Court is the fashioning of a temporary remedy to permit municipal court elections to proceed pending legislative adoption of an election plan that will satisfy Section 5 preclearance requirements. How the County fashions such a final plan within the restrictions of California law

⁹ Even if it be conceded that creation of multiple municipal court districts would enable the County to satisfy the nonretrogression requirements of Section 5, the district configurations themselves may still be subject to constitutional challenge unless they are narrowly tailored to effectuate nonretrogression only. (*Shaw v. Reno*, 113 S.Ct. at 2830-2831; *see* note 2, *supra*.)

is a matter for discussions between the County and the United States Attorney General.

There appears to be no justification for requiring the Court to restructure municipal court election districts, whether according to Alternative No. 1 or Alternative No. 2, in order to accomplish a temporary purpose -- this is not a Section 2 case, but a Section 5 case. Other, less dramatic, temporary remedies might be available, e.g., shortened terms of office coupled with periodic reports to the Court by the County and the United States concerning efforts to fashion a satisfactory election plan for the limited purpose of satisfying Section 5 of the Voting Rights Act.¹⁰

CONCLUSION

Of the two alternatives proffered by the County, Alternative No. 1 would have the Court order the creation of two municipal court districts for purposes of conducting elections in June. Alternative No. 2 would have the court deny citizens the right to vote for some of the judges in the municipal court district -- on the basis of race.

To be sure, a federal court order to create a separate municipal court district is a rather drastic remedy, particularly as a temporary measure in a Section 5 case. However, the only other alternative proffered by the County for temporary relief limits significant federal constitutional rights without adequate justification.

¹⁰ The state constitutional restrictions that are perceived to be obstacles by the County are presumptively valid. Accordingly, in light of the considerable passage of time before plaintiffs brought their Section 5 claim, it may not now be feasible to accomplish perfect nonretrogression at this late date consistent with California law. Whether that is, in fact, the case, and how such an eventuality might bear on the Attorney General's decision whether to interpose an objection to a final plan, are issues not presently before the Court.

Inasmuch as Alternative No. 1 exists as an option for the Court that has been recommended by the County, as a matter of law, Alternative No. 2 cannot be said to be the most narrowly tailored temporary remedy for a violation of Section 5 of the Voting Rights Act. Accordingly, if the Court is going to choose between Alternative No. 1 and Alternative No. 2, for purposes of temporary relief, the Court must select Alternative No. 1.

DATED: November 10, 1994

Respectfully submitted,
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(Declaration of Service Omitted in Printing)

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DEC 20, 1994
Richard W. Wieking
Clerk, U.S. District Court
Northern District of California
San Jose

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

VICKY M. LOPEZ, CRESCENCIO
PADILLA, WILLIAM A. MELENDEZ,
JESSE G. SANCHEZ, and DAVID
SERENA,

Plaintiffs,

v.

MONTEREY COUNTY,
CALIFORNIA,

Defendant.

NO.
C 91 20559
RMW (EAI)
ORDER
ENJOINING
ELECTIONS
PENDING
PRECLEAR-
ANCE OF
PERMANENT
PLAN EXCEPT
FOR COURT-
ORDERED
SPECIAL
ELECTION
IN 1995

I. INTRODUCTION

This is a case in which the plaintiffs challenged the implementation of six Monterey County ordinances on the ground that they were not precleared as required by the Voting Rights Act, 42 U.S.C. § 1973c. The ordinances consolidated two municipal and seven justice court districts into a single municipal court district with the judges being elected at large from the entire county. The court previously determined that the ordinances were subject to preclearance and that preclearance had not been obtained. The County then sought preclearance but

discontinued its effort stipulating that it could not establish that the consolidation ordinances did not have the effect of denying the right to vote to Latinos as a result of the retrogressive effect that consolidation had on Latino voting strength. Pursuant to this court's order which included an injunction prohibiting an election pending adoption and preclearance of an election plan,¹ the County next attempted to secure an amendment to the California Constitution regarding the configuration of districts, so it could implement an election plan that complied with the Voting Rights Act and did not violate any provision of California law. The County was unsuccessful. The question now facing the court is what remedy, under the circumstances, is appropriate.

II. SUMMARY OF CURRENT ISSUE BEFORE COURT AND DECISION THEREON

Plaintiffs and Monterey County urge the court to allow elections to take place under a plan that would involve maintaining the current single, county-wide district but with election areas. This plan would eliminate linkage between the judges' jurisdictional and electoral bases and would split the City of Salinas into two areas for election purposes. However, it would allow the County to continue its current administrative scheme for the county-wide operation of the municipal courts. As an alternative, plaintiffs and the County ask that the court authorize the County to implement a plan which would include more than one district and would split the City of Salinas.² This

¹ The County has chosen not to attempt to obtain preclearance of a plan that potentially violates state law in any way without this court's permission, apparently believing that any attempt to do so would result in preclearance rejection or be futile.

² Return to the last lower court district plan in effect before passage of the subject ordinances was conceded by plaintiffs and the County to be impractical.

plan would require substantial administrative changes in the operation of the courts. The State of California and Municipal Court Judge Fields, both of whom have intervened, object to the proposals made as unnecessarily intrusive on state interests.

For the reasons set forth below, the court hereby continues its injunction prohibiting Monterey County from holding elections for municipal court judges pending adoption and preclearance of a permanent plan, except the court orders that a special election be held in 1995 to protect the rights of the citizens to elect judges while a permanent legislative solution is being developed and precleared. The court-ordered special election will be held pursuant to an election area plan, specifically the "Municipal Court Division Plan" as described in the Second Stipulation presented to the court by plaintiffs and the County on January 13, 1994. The terms of the judges elected will expire on the first Monday in January 1997.

III. BACKGROUND

Prior to 1968, Monterey County had two municipal and seven justice court districts. By ordinances enacted by the County between 1968 and 1983, those districts were consolidated so as to provide for one municipal court district with judges elected at large from the entire county. The consolidation ordinances were subject to review under Section 5 of the Voting Rights Act and, on September 6, 1991, plaintiffs herein filed this Section 5 enforcement action seeking declaratory and injunctive relief requiring the County to seek preclearance of the ordinances before enforcing them further. Pursuant to 28 U.S.C. § 2284, the case was assigned to this three-judge court. On March 31, 1993, this court found that the ordinances did, in fact, require preclearance, that such preclearance had not been obtained, and that the ordinances could not be enforced without preclearance. In response to the court's order, the County, on August 10, 1993, filed a declaratory judgment action in the United States District Court for the District of Columbia to obtain after-the-fact preclearance

of the ordinances. County of Monterey v. United States of America, No. 93-1639 (D.D.C. filed Aug. 10, 1993). That action was subsequently dismissed upon a stipulation that "[t]he Board of Supervisors is unable to establish that the Municipal Court Judicial Court Consolidation Ordinances adopted by the County between 1968 and 1983 did not have the effect of denying the right to vote to Latinos in Monterey County due to the retrogressive effect several of these ordinances had on Latino voting strength in Monterey County." Monterey County, Cal., Resolution 94-107 (March 15, 1994).

Monterey County and plaintiffs then agreed to the implementation of an "Election Area Plan" for the election of municipal court judges and requested that this court order the County to adopt the system. The Election Area Plan consisted of seven election areas which were specific geographic areas in which only the residents could vote. The areas were to be used solely for election purposes and there would remain only one county-wide municipal court district for all other purposes. The parties acknowledged that the plan might conflict with Article VI, Section 16(b) of the California Constitution, since it removed the linkage between a judge's electoral and jurisdictional bases. They asked the court to authorize the County to adopt the plan and the County stated that it would then seek preclearance. The State of California asked to intervene and objected to the issuance of an order authorizing the plan. The court, by order dated December 22, 1993, allowed the State to intervene and declined without prejudice to approve the proposed Election Area Plan because it was not satisfied that a plan necessarily had to conflict with the California Constitution in order to comply with the Voting Rights Act. Judge Michael S. Fields, a municipal court judge, was also allowed to intervene in his personal capacity.

On January 13, 1994 the County submitted a new stipulation and proposed order in response to the court's order of December 22, 1993. The new proposed plan, entitled

"Municipal Court Division Plan," called for four divisions. The divisions, like the areas in the previously proposed Election Area Plan, were specific geographic areas in which only the residents could vote. The divisions were to be used solely for election purposes and not for assignment of cases, court locations, or any other purpose. Plaintiffs and the County suggested that the Division Plan did not violate the state constitution, but requested the court to approve it even if it felt otherwise. The State and Judge Fields objected to acceptance of the Division Plan on the basis, among others, that it violated Article VI, Section 16(b) of the California Constitution, which requires that judges be elected in their counties or districts. In its order dated February 28, 1994 the court again stated that it was not satisfied that an election plan had to conflict with the California Constitution in order to meet the requirements of the Voting Rights Act and implicitly held that the Division Plan in fact did so conflict. The court further ordered that the County submit for preclearance an election plan that complied with the Voting Rights Act and all applicable provisions of the California Constitution and state law, or show cause why it could not do so.

On March 31, 1994, in a hearing to show cause, the County explained why it could not submit the requested plan for preclearance and referred to Board of Supervisors' Resolution 94-107, which made certain findings supporting the Board's conclusion that "[t]he Board of Supervisors is unable to devise or prepare any plan for the election of municipal court judges in Monterey County that does not conflict with at least one state law and still comply with the Voting Rights Act." On June 1, 1994 the court issued its order enjoining Monterey County from holding elections for municipal court judges pending adoption and preclearance of a plan for their election. The County was ordered to take the necessary steps to obtain changes in existing state law and county ordinances to effectuate such a plan. The parties were also ordered to appear on November 3, 1994 to report on their progress.

Following the court's order of June 1, 1994, the County made a good faith effort to secure passage of an amendment to the California Constitution regarding the configuration of municipal court districts in Monterey County. The efforts were unsuccessful for reasons that appear unrelated to any controversy regarding the proposed amendment. Plaintiffs and Monterey County now urge the court to allow elections to take place under the Municipal Court Division Plan which they had proposed to the court on January 13, 1994. As an alternative, they ask that the court authorize the County to implement a plan which would include districts that split cities.

IV. ANALYSIS

The final step for the three-judge court is to determine "what remedy is appropriate." Section 5 contemplates injunctive relief, which is by its nature equitable. Moreover, the Supreme Court has indicated that the three-judge court has some limited discretion in fashioning a remedy by directing that the court must fashion an "appropriate" remedy. *See e.g., Perkins v. Matthews*, 400 U.S. 379, 441, 91 S.Ct. 431, 441, 27 L.Ed. 2d 476 (1971) (questions of appropriate remedy for district court)

Brooks v. State Board of Education, 775 F. Supp. 1470, 1482 (S.D. Ga. 1989).

Since the County did not obtain preclearance for the consolidating ordinances it enacted after 1968, this court must enjoin elections under those ordinances. The question that remains then is how, under the existing circumstances, should the court further "fashion an appropriate remedy" under its equitable powers. A return to the system that was last in effect before the adoption of the unprecared ordinances is impractical and no party seems to seriously advocate that even as an interim

solution.³ Continuance of the injunction without any election pending implementation of a precleared system would deprive the voters of their right to elect judges. Obviously, the court cannot overlook the importance of the citizens' right to elect judges while a permanent legislative solution is being developed and precleared. A memorandum dated January 11, 1994 from the Registrar of Voters shows that seven of the ten judicial offices would have been up for election in 1994 but for the preclearance problem and the court's injunction. As noted in *Wise v. Lipscomb*, 437 U.S. 535, 540, 98 S. Ct. 2493, 2497 (1978) (citation omitted):

Legislative bodies should not leave their reapportionment tasks to the federal courts; but when those with legislative responsibilities do not respond, or the imminence of a state election makes it impractical for them to do so, it becomes the "unwelcome obligation" of the federal court to devise and impose a reapportionment plan pending later legislative action.

Therefore, the court concludes that its remedy must allow for an

³ The last lower court district plan in effect at the time Monterey County became a covered jurisdiction consisted of two municipal districts, with two municipal court judges in each such district, and seven justice court districts with one justice court judge in each such district. Monterey County, Cal., Ordinance 1347, as amended by Ordinance 1597. In addition to resolving problems associated with the fact that seven of the districts were justice court districts and the total number of municipal court judges is now ten, the districts would have to wrestle with the fact that several of the districts would be very small. This would undoubtedly result in administrative problems including frequent assignment of judges to districts other than their own.

election pending the implementation of a permanent legislative solution. See Berry v. Doles, 438 U.S. 190, 98 S.Ct. 2692 (1978) (suggesting that a special election could be considered by the district court if Section 5 approval was not obtained for a voting change). The interim election plan shall call for a special election in 1995 that is not unduly intrusive on state law and policies and not unreasonably disruptive to the County's interests in effective and efficient delivery of municipal court services. Under the Supremacy Clause, the implementation of relief for a violation of the Voting Rights Act must take precedence over enforcement of state law that stands in the way of effective relief. See Katzenbach v. Morgan, 384 U.S. 641, 646-47 (1966). The terms of those elected, however, will expire on the first Monday in January 1997, so that the County understands that it must have a permanent solution in effect by the time of the next general election or it will risk being without judges.

The court is satisfied that there are only two viable alternatives for an interim, emergency election plan.⁴ One is to authorize the County to implement an interim plan which includes districts that split the City of Salinas. This would require the court to "suspend" application of Article VI, Section

⁴ The court does not imply that the consolidation ordinances which the court found had not been precleared necessarily resulted in a voting procedure that violates Section 2 of the Voting Rights Act (42 U.S.C. 1973(a)), i.e. that the voting procedure results in a denial of the right of any citizen to vote on account of race or color. While evidence has been offered to that effect by the stipulation between plaintiffs and defendant County, this court has not made such a finding. However, the court is reluctant to consider a single district, county-wide election plan as a temporary remedy in light of the supported stipulation that such a plan would be retrogressive in terms of Latino voting strength.

5 of the California Constitution in order to allow compliance with the Voting Rights Act. This approach is favored by the State and Judge Fields over the second alternative discussed below, although the State contends that there is no basis for the court to relieve the County from any of the state's constitutional restrictions.⁵

The other alternative is to permit the County to implement a temporary election plan that is predicated on the Municipal Court Division Plan such as described in the Second Stipulation submitted to the court in January 1994. Under this plan, a judge's jurisdictional and electoral bases would not be coterminous. This plan would require the "suspension" of Article VI, Section 16(b) of the California Constitution. It would also

⁵ The State's brief is not clear as to whether the State believes that the court has no basis for relieving the County from any of the State's constitutional restrictions on a temporary basis or whether it only objects to the court's attempting to give some sort of permanent authorization to violate state law. The court agrees with the State that any attempt to give the County approval to violate existing state law on a permanent basis is, at this time, beyond the scope of this court's function. However, temporary relief is necessary to enable elections to go forward at this time without violating the Voting Rights Act. The State's suggestion that an election with shortened terms of office coupled with periodic reports to the court would be a less drastic solution does not address the question of under what plan such an election would take place. As noted earlier, no party seems to question the County's assertion that it is not now feasible to return to the *status quo ante*. In fact, any attempted return to the districts existing in 1968, the date of the last lawful judicial district map adopted by the Board of Supervisors, would result in judges being frequently and regularly assigned outside their districts.

require the splitting of the City of Salinas.

The court has considered in analyzing alternatives for an interim plan the recent en banc decision in Nipper v. Smith, No. 92-2588, 1994 WL 642754 (11th Cir. Dec. 2, 1994), in which black voters and an association of black attorneys contended that the use of at-large elections in trial court jurisdictions diluted the voting strength of the black minority in violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973(a). The court found that plaintiffs had established vote dilution, but that none of the remedies sought provided an objectively reasonable and workable solution to the vote dilution and that they would actually undermine the court's ability to administer justice. *Id.* at *47-51. The proposed remedies included alternatives of electoral subdistricts and the creation of new circuits which would contain sufficient black voters to enable them to elect a candidate of their choice.

In the present case, the court is not faced with deciding whether a voting scheme violates Section 2. It is presented with the problem of what interim solution should be implemented pending the legislative enactment of a precleared voting plan. Evidence has been offered that Latino voters have had their voting strength diluted and, therefore, a special election under an at-large system would probably preclude them from electing any judge of their choice. On the other hand, persuasive evidence has not been offered that the court's ability to administer justice would be undermined by the two alternatives under consideration. The court, however, acknowledges that ultimately an at-large system or a system different from either of the two proposed alternatives may prove, under the totality of circumstances, to be the best judicial election scheme.

The prohibition against dividing a city into more than one district is set forth in Article VI, Section 5(a) of the California Constitution which provides in part: "Each county shall be divided into municipal court and justice court districts as provided by statute, but a city may not be divided into more than

one district."⁶ The State's interest in preventing the division of cities does not appear to reflect any compelling state policy. In fact, the City of San Diego has been specifically authorized to divide cities if "the Legislature determines that unusual geographic conditions warrant such division." Cal. Const. art. VI, § 5(b). However, the creation of a multidistrict plan in Monterey County would require substantial administrative changes which would necessarily include reassignment of personnel, setting up new administrative procedures and the like. Further, these changes might be in effect for only the time period preceding the adoption of a permanent precleared plan. The court, therefore, finds that while a one-time, temporary suspension of the application of the city splitting prohibition would not interfere with a compelling state interest, implementation of a temporary multidistrict municipal court district plan would significantly interfere with the County's ability to provide uninterrupted efficient and effective delivery of municipal court services.

The proposed division plan allows the County to continue administratively operating the municipal courts in the county as it currently does. The problem, of course, is that the plan involves a separation of the electoral and jurisdictional bases of municipal court judges. Article VI, Section 16 provides that "[j]udges of [municipal] courts shall be elected in their counties or districts at general elections." Therefore, this division or election area plan denies residents of the Monterey County Municipal Court District the right to vote for some of the judges in the county-wide district. At first glance, this would seem to constitute a substantial intrusion on state interests. As the State points out, historically, municipal and small claims courts have been intended to be responsive to the ordinary

⁶ California Government Code Section 71040 similarly prohibits the dividing of a city so that it lies within more than one district.

affairs of the citizens of their districts.⁷ Several courts have noted that linkage between electoral and jurisdictional bases is a recognized state interest: "The overwhelming preservation of linkage in states that elect their trial court judges demonstrates that district-wide elections are integral to the judicial office and not simply another electoral alternative." League of United Latin American Citizens v. Clements, 999 F.2d 831, 872 (5th Cir. 1993); see also Nipper v. Smith, 1994 WL 642754 at *47-51.

However, on closer analysis the intrusion on state law does not seem as substantial as it initially appears. The process of municipal courts extends throughout the state, Cal. Civ. Proc. Code § 84, and, therefore, the jurisdiction of a municipal court judge extends outside the geographic limits of the judge's district. In addition, Article VI, Section 15 of the California Constitution provides that "[a] judge eligible for municipal court service may be assigned by the Chief Justice to serve on any court." This provision authorizes the Chief Justice to assign municipal court judges from one municipal court district to serve in other municipal court districts. Sometimes the Chief Justice issues "blanket assignments." As noted in the 1994 Annual Report of the Judicial Council of California:

Blanket (within county) and reciprocal (between counties) assignments are issued each year by the Chief Justice to permit judges of one court to sit

⁷ The State also contends that the implementation of the division plan proposed by plaintiffs would raise many questions about the authority and status of "election area" judges. These concerns seem somewhat unfounded, since the proposal only concerns the election process and does not otherwise attempt to affect the authority and status of the judges. Further, the plan is not being implemented as a legislative solution to the existing Voting Rights Act problem facing the County, but is rather being implemented by the court as an interim, emergency solution to insure the voters' right to elect municipal court judges.

as judges of another court within their county or in a neighboring county. A total of 193 blanket assignments and 73 reciprocal assignments were issued during fiscal year 1992-93.

Judicial Council Report at 167.

These facts show that in practice the rights of nonresidents are often judged by resident judges. Also, nonresident judges are frequently assigned to other districts. Therefore, as a practical matter, linkage between a judge's electoral and jurisdictional bases cannot be considered an overwhelmingly strong public policy. The district court in Cousin v. McWherter, 840 F. Supp. 1210, 1220 (E.D. Tenn. 1994) so recognized in holding that the use of a single, at-large district for election of voters violated the Voting Rights Act:

The Court finds that this policy underlying the practice of county wide election for judges is tenuous if a totality of circumstances test is utilized. Any voter in any number of different situations may be subjected to the jurisdiction of a judge for which they had no opportunity to vote such as a federal judge, or a judge in another county or another state. Judges routinely respond to litigants who will not have the opportunity to vote for the judge in an election. There is never a guarantee that jurisdiction and electorate will be coextensive.

The dissenting judges in Nipper also questioned the importance of linkage as a component of state policy. Nipper v. Smith, 1994 WL 642754 at *61-62. Although an election division plan as proposed will undoubtedly cause more parties to have their cases heard by judges who did not elect them, there is no strict linkage presently existing in California courts.

The concern of the State and Judge Fields that an election area plan may violate the Equal Protection clause of the Fourteenth Amendment seems unfounded. No case has been

cited which comes to that conclusion. However, several courts have remedied violations of Section 2 of the Voting Rights Act in cases involving at-large or circuit-wide judicial election systems by ordering the use of election sub-districts that are not coterminous to the jurisdictional bases of the elected judges. See Clark v. Roemer, 777 F. Supp. 471 (M.D. La. 1991), appeal dismissed, 958 F.2d 615 (5th Cir. 1992) (Louisiana trial and appellate courts); Martin v. Mabus, 700 F. Supp. 327 (S.D. Miss. 1988) (circuit, chancery, and some county court judges); and Hunt v. Arkansas, No. 89-406 (E.D. Ark. Nov. 7, 1991) (consent decree concerning trial courts of general jurisdiction).

The court, therefore, concludes that the Municipal Court Division Plan, as an interim plan, minimally intrudes on state interests and enables the County to maintain its current administrative operation of the municipal courts while it is working for a permanent legislative solution to its Voting Rights Act problem.⁸ The calendar for such an election is set forth in the memorandum of the Registrar of Voters to County Counsel dated October 4, 1994 (Appendix A).

Although a federal court's authorization of the emergency, interim use of a court-created election plan does not normally require preclearance, see 28 C.F.R. § 51.18(c), such preclearance is required when the covered jurisdiction submits a proposal reflecting its policy choices irrespective of what constraints have limited the choices available to it. McDaniel v. Sanchez, 452 U.S. 1128, 101 S. Ct. 2224 (1981). Since the court-ordered plan here is based upon a proposal submitted by the County, the County may be statutorily required to seek preclearance of the plan, even though it is only an interim,

⁸ The court does not intend by this order to pass judgment on the merits of the proposed election area plan as a potential permanent plan. That judgment is best left to legislators.

court-directed plan. This should present no obstacle, however, as the Attorney General is apparently prepared to give expedited approval. Amicus Curiae Brief of the United States dated May 13, 1994, at 9 n. 10.

V. ORDER

1. Monterey County is ordered to develop a permanent plan for the election of municipal court judges which complies with the Voting Rights Act and does not violate state law. The County shall take any steps required to obtain changes in existing state law and county ordinances.

2. Monterey County is hereby enjoined from holding elections for municipal court judges pending adoption and preclearance of a permanent plan or further order of this court.

3. Notwithstanding paragraph 2 above, the County shall implement as a court-ordered, emergency, interim plan for a special election in 1995 the election plan set forth in the Second Stipulation presented to the court by Plaintiffs and the County on January 13, 1994 with a new election calendar as set forth in the memorandum of the Registrar of Voters to the County Counsel dated October 4, 1994. The terms of office of those elected pursuant to the interim plan shall expire on the first Monday in January 1997. The court foresees that a permanent, precleared plan will be implemented in time for the next general election in 1996. The court retains jurisdiction over the implementation of the court-ordered, interim plan.

Dated: 12/20/94

/s/

Ronald M. Whyte
United States District Judge
On Behalf of the Panel

Filed
JAN 10, 1995
Richard W. Wicking
Clerk, U.S. District Court
Northern District of California
San Jose

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

VICKY M. LOPEZ, CRESCENCIO
PADILLA, WILLIAM A. MELENDEZ,
JESSE G. SANCHEZ, and DAVID
SERENA,

Plaintiff,

v.

MONTEREY COUNTY,
CALIFORNIA,

Defendant.

NO.
C-91-20559-
RMW (EAI)
ORDER
CLARIFYING
ORDER
DATED
DECEMBER
20, 1994

PANEL: Circuit Judge Mary M. Schroeder and
District Judges James Ware and
Ronald M. Whyte

The court's order dated December 20, 1994
contemplates the normal election process for municipal court
judges, except as otherwise specified in the order. Under
California law, municipal court judges are elected only by
majority vote, not by a simple plurality of votes cast. Therefore,
the court's order requires a primary election with run-offs
thereafter, if necessary.

Dated: 1/10/95

/s/
Ronald M. Whyte
United States District Judge
On Behalf of the Panel

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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

VICKY M. LOPEZ, CRESCENCIO
PADILLA, WILLIAM A. MELENDEZ,
JESSE G. SANCHEZ, and DAVID
SERENA,

Plaintiffs,

v.

MONTEREY COUNTY,
CALIFORNIA,
Defendant,

STATE OF CALIFORNIA,
Defendant-Intervenor.

NO.
C-91-20559-
RMW (EAI)
Voting Rights
Action
Three Judge
Court

**PLAINTIFFS' SECOND NOTICE REGARDING
ELECTION SCHEDULE PROPOSED
BY MONTEREY COUNTY**

On January 4, 1995, the Plaintiffs forwarded to the Court
by facsimile transmission Plaintiffs' Notice Regarding Election
Schedule Proposed by Monterey County. Plaintiffs' January 4,
1995, Notice was based upon the correspondence forwarded by
Defendant Monterey County on December 22, 1994. In the

December 22, 1994, correspondence Monterey County proposed holding only one election in June 1995 based upon the Court's interim court-ordered election plan to elect judges to the Monterey County Municipal Court District. Plaintiffs did not oppose such a proposal since the underlying assumption was that any run-off elections would be held in November 1995. Since the 1996 election process would commence in the latter part of December 1995 or shortly thereafter, Plaintiffs agreed that a November 1995 run-off election would place an additional burden on judicial candidates by requiring the newly elected municipal court judges to start their re-election campaigns within a two month period after their assumption of judicial office in November 1995.

On January 5, 1995, the United States Attorney General forwarded by facsimile transmission the Response of United States to Court's Inquiry Regarding Special Election Schedule. The Response appears to suggest that a single election in the context of this litigation may not receive the necessary approval pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973 c. Subsequently on January 6, 1995, Monterey County forwarded by facsimile transmission a correspondence indicating that if the Court were to order a run-off election, such an election could be held as early as August 1, 1995.

In view of the concerns expressed by the United States Attorney General and the notice by Monterey County that a run-off election could be held as early as August 1, 1995, the Plaintiffs are submitting this Second Notice to express approval of a special run-off election to be held as early as August 1, 1995. Having such a run-off election on August 1, 1995, would clearly address the concerns expressed by the United States Attorney General and could result in an expedited Section 5 approval of the Court's election plan.

DATED: January 7, 1995

JOAQUIN G. AVILA
BARBARA Y. PHILLIPS
By:

/s/

JOAQUIN G. AVILA

Attorney for Plaintiffs

(Declaration of Service Omitted in Printing)

Filed
JAN 18, 1995
Richard W. Wieking
Clerk, U.S. District Court
Northern District of California
San Jose

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

VICKY M. LOPEZ, CRESCENCIO
PADILLA, WILLIAM A. MELENDEZ,
JESSE G. SANCHEZ, and DAVID
SERENA,

Plaintiffs,

vs.

MONTEREY COUNTY, CALIFORNIA,

Defendants,

STATE OF CALIFORNIA,

Intervenor,

MICHAEL S. FIELDS,

Intervenor.

NO.
C-91-20559-
RMW (EAI)
(Voting Rights
Action/Three
Judge Court)

ORDER
GRANTING
WITHDRAWAL
OF
INTERVENOR

Good cause appearing,

IT IS HEREBY ORDERED that the application of
Intervenor Michael S. Fields to withdraw is granted.

Dated: 1/18/95

/s/ - Ronald M. Whyte
Judge,
United States District Court

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Attorneys for Proposed Intervenor
Stephen A. Sillman as Presiding
Judge of the Monterey County
Municipal Court

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

VICKY M. LOPEZ, et al.,

Plaintiffs,

vs.

MONTEREY COUNTY,
CALIFORNIA,

Defendants.

NO.
C-91-20559-
RMW (EAI)
THREE JUDGE
COURT

DECLARATION
OF
HONORABLE
STEPHEN A.
SILLMAN,
PRESIDING
JUDGE OF THE
MONTEREY
COUNTY
MUNICIPAL
COURT

I, Stephen A. Sillman, declare:

1. I am the Presiding Judge of the Monterey County
Municipal Court. I have held this position since January 1,

1995. I was previously Presiding Judge for the 1988 calendar year. I have been a member of the court since August 1982. My current term runs from January 1993 through January 1999.

2. The Three-judge Court in this case entered orders on December 20, 1994 and January 10, 1995 providing for Municipal Court elections in 1995 and 1996. (The December 20 and January 10 orders are collectively referred to herein as the "Election Order.") Under the Election Order there will potentially be 21 judicial elections involving 8 of the Municipal Court's 10 judges over approximately the next 17 months. The time required for the affected Municipal Court judges to campaign and engage in the necessary activities for election will significantly interfere with the administration of justice in the Monterey County Municipal Court and potentially impair the constitutional rights of Municipal Court litigants.

3. I make this declaration of my personal knowledge, except for those matters stated herein on information and belief, in support of my request to intervene in this action in my official capacity as presiding judge of the Monterey County Municipal Court.¹ I seek intervention for the limited purpose of requesting that the Three-judge Court consider a modification of its Election Order to provide for six-year terms retroactive to 1994 for the judges subject to election in 1995. To my knowledge, the Three-judge Court has not been previously advised of the severe impact the Election Order would have on the official duties of the Municipal Court judges. I also request leave to intervene in my official capacity in order to advise the Three-judge Court of the potential effect of future remedial proposals on the ability of the Municipal Court to perform its official duties. I believe my intervention as presiding judge will provide more complete information to the Three-

¹ My seat will not be up for election either in the 1995 special elections ordered by the Three-Judge Court or in the 1996 regular judicial elections.

judge Court, hopefully avoiding the need for future requests for reconsideration because the Court lacked information material to its decisions.

4. The presiding judge of the Municipal Court has not previously sought intervention because my predecessors have been advised by County Counsel since the very inception of this action that, in the opinion of that office, the Municipal Court does not have a legally cognizable interest in a voting rights action. (County Counsel provides legal representation on official matters to the Monterey County Municipal Court, except in the cases of conflict of interest.) Representation was also formally requested by Judges Fields and Scott and denied on the same basis. Hence, Judge Alan Hedegard, my predecessor as presiding judge has participated as an amicus curiae. County Counsel has provided to the presiding judge copies of court documents and orders, and occasionally met with individual judges.

5. While I did not necessarily agree that this action could have no impact on the official duties of the Municipal Court or its judges, at the stage of the proceeding at which the prior requests for representation were made, it was debatable whether an "individual" interest was being asserted or an interest that affected the official duties of the court. The Election Order is different. In my view, the impact of the Election Order on the ability of the Municipal Court and its judges to perform their official duties is clear.

6. Neither Judge Hedegard nor I were aware of the provisions of the December 20 Order until after it was issued. It is my understanding that interim elections in 1995 were to be discussed at a November 3, 1994 status conference. Judge Kingsley, who attended the November 3 conference told me, however, that such matters as primary and runoff elections in 1995 and abbreviated one-year terms for the judges subject to election in 1995 were not discussed. Rather, the focus was on an equal protection question raised by the state Attorney

General which became the subject of post-status conference briefing.

7. Judge Hedegard has advised me that he learned of the December 20 Order the day it was issued. Later that same day, he met with County Counsel who informed him that the Board of Supervisors planned to comply with the order at its regularly scheduled meeting that very day. Because of the need to implement the Order expeditiously, the Board planned to forego a public hearing and instead implement the December 20 order by resolution. The Board did so.

8. Judge Hedegard immediately contacted an attorney, Ms. Marguerite Leoni of Nielsen, Merksamer, Parrinello, Mueller & Naylor, who is experienced in Voting Rights Act and redistricting law and a meeting was scheduled. Neither Judge Hedegard nor I was advised that after issuing the December 20 Order, the Three-judge Court had requested briefing from the parties concerning whether the December 20 order should be modified to add runoff elections in 1995. While Judge Hedegard did receive copies of briefs and letters after they were filed, he was not consulted about the impact such a modification could have on the court. Hence, an opportunity was missed to bring these matters to the Three-judge Court's attention. I learned about the Three-judge Court's January 10 order from a newspaper report the next day.

9. Several other Municipal Court judges and I met with Marguerite Leoni on January 10. Afterwards, Ms. Leoni contacted all counsel of record and informed them of the consequences that the Election Order would have on the administration of justice by the Municipal Court judges. Ms. Leoni also requested that the parties consider applying to the Three-judge Court for a stipulated modification of the Election Order. I contacted County Counsel about this matter by letter dated January 13, 1995, and I officially requested that the County provide legal representation to the Municipal Court on these questions. (Attachment A.) I was informed by return

letter that County Counsel would recommend that my request be denied, but that the matter would be considered by the Board of Supervisors at its January 24 meeting. (Attachment B.) I requested permission to address the Board of Supervisors on this issue. In my absence, Judges Moody, Duffy, Anderson and Curtis addressed the Board on January 24, 1995, and informed the Board of the impact of the Election Order on the Municipal Court. After that meeting the Board instructed County Counsel to apply to the Three-judge Court for a modification of its Election Order to provide that the Municipal Court judges subject to election in the 1995 special elections serve six-year terms retroactive to 1994. While this seemed inconsistent with the County's refusal to provide representation to the Municipal Court in its official capacity, my interests as presiding judge were satisfied if the County would advise the Three-judge Court about the impact its Election Order would have on the official duties of the Municipal Court and request a modification. (See Minutes of the January 24 meeting of the Board of Supervisors and newspaper reports of the actions of the Board of Supervisors, all of which are included in Attachment C.)

10. Pursuant to that information, I immediately prepared a detailed nine-page declaration as Presiding Judge describing how the Election Order would affect the duties of the Municipal Court and I delivered it to County Counsel on or about February 6 to be filed in support of the County's request for a modification of the Election Order. Since then over a month has elapsed.² I feel I have no other alternative at this

² It is my understanding that the County planned to make its request for a modification in part on the ground that it is not feasible to have a precleared permanent plan in place in time for the 1996 elections. The County has previously indicated its belief that the only way to comply with the requirements of both federal and state law in the design of a permanent plan is to amend the state's constitution and that cannot be accomplished

point, but to request intervention.

11. The December 20 order provides for special elections for seven seats on the Municipal Court in June 1995 to be conducted in a temporary four-division electoral plan. On January 10, 1995, the Three-judge court entered an order clarifying the December 20 order and providing for a runoff election in August 1995 if no candidate received a majority vote in June. Under the provisions of the Election Order, the terms of the judges elected in 1995 end on January 1, 1997. Hence, the judicial seats which require election in 1995 plus one other are scheduled for election again in 1996 with a primary in June and a runoff in November. Four of the seven seats up for election in 1995 were challenged. Hence, there will be four elections in June and the likelihood of a runoff in August in a multiple candidate election in Division 4. The same seven seats plus one additional judicial position are up for election again in 1996 primaries and runoffs for a total of potentially 21 judicial elections in 17 months.

12. The Election Order represents an undue burden on the ability of the Municipal Court judges to carry out their official duties and responsibilities, including guaranteeing basic constitutional rights. The eight judges affected by the Election

in time to hold elections in 1996. The Municipal Court has not been included in or consulted about any of the discussions between plaintiffs and the County concerning the proposed remedies in this case. I am factually unfamiliar with them and thus have not formed any legal opinion on whether or not the State Constitution must be amended to satisfy the Voting Rights Act. Hence, it is not at all clear to me that a permanent plan cannot be in place in time for the 1996 judicial elections. Nevertheless, the ability of the Monterey County Municipal Court to perform its official duties while under the campaign/fundraising schedule set in the Election Order is not dependent on whether or not the state Constitution is amended.

Order must spend a significant amount of time campaigning and fundraising³ with scheduled time off from the bench. The four judges who must run both in 1995 and 1996, could be campaigning and fundraising for virtually 2 years. The length of the campaign and the number of judges involved will be a substantial drain on the resources of the Municipal Court, will severely burden its ability to adjudicate cases in a timely fashion, and will potentially impact the constitutional rights of litigants.

13. The Monterey County Municipal Court is only a 10-judge bench. The practical effect of the Election Order is potentially 21 primary and runoff elections in 17 months involving 4 to 8 of the 10 judicial positions on the Monterey County Municipal Court. Based on my personal knowledge of the time demands of judicial campaigns, my experience as Presiding Judge with responsibility for the efficient adjudication of cases by the court without undue delays, and my knowledge of the operation of the Monterey County Municipal Court. The impact will extend months and perhaps as long as a year beyond the 1996 elections.

14. In 1982, the Municipal Court adopted the federal system of case assignment. Cases are assigned to a particular judge for all purposes. In the 1992-93 fiscal year, nearly 103,000 cases were filed in the Municipal Court, of these 93,581 were criminal proceedings (including 1,957 felonies, 9,531 misdemeanors, and 5,111 DUI cases) and 9,237 were civil actions. This is over 8,500 filings per month. (The 1993-94 figures are not yet available.) The Judicial Administration Standards issued by the California Judicial Council and contained in the California Rules of Court provide the time frames to which a municipal court should adhere in adjudicating its cases (copy of the relevant section is attached as Attachment D). 90 percent of felony cases must be disposed of within 1

³ For example, my 1986 campaign cost \$43,917.00. I won in the primary so no runoff was required.

month of the defendant's first court appearance, 98 percent must be resolved in 45 days, and all cases must be adjudicated within 3 months. The same time frames have been set for misdemeanor cases and infractions. For general civil cases, 90 percent must be resolved in 12 months, 98 percent resolved in 17 months, and 100 percent disposed of within 2 years. The Monterey County Municipal Court meets these standards. To do so, however, requires each judge to adhere to a rigorous calendar with minimal extensions and continuances.

15. Requiring 40 percent of the Monterey County Municipal Court to run for election in 1995 and potentially 80 percent to run in 1996 will make it extremely difficult, if not impossible for the Municipal Court to meet the timelines set forth in the Judicial Administration Standards. The consequences will be unprecedented. Generally only one judge (or possibly two) is ever involved in an election at any one time. Because of the time demands of campaigning, the progress of a courtroom calendar slows down when a judge is required to schedule time off to attend to campaign fundraising, public appearances, citizen forums, and other campaign activities in connection with reelection. As the election date grows near, a judge involved in an election has, in the past, typically scheduled vacation time for the three weeks or so prior to the election in order to devote full time to the campaign.

16. I ran for reelection in 1986. I was one of only two judges involved in an election that year. I started my campaign in earnest in February and took vacation for three weeks prior to the election. In order to be absent from the bench, I was required to double set, reset or continue matters on my calendar and set some hearings beyond the normal scheduling limits. Despite these accommodations, by the time the election was over, my calendar was at least one month behind. In my absence, the other judges were able to provide coverage in those instances where cases were legally required to be heard. Since I did not need to campaign again in a runoff

election, I was able to get my calendar back on schedule within a few months.

17. Another example of the disruption caused to a judge's calendar by campaigning in an election occurred in 1994 when Judge Michael Fields (who was an intervenor in this case at that time) ran for election to the Monterey County Superior Court. The average number of pretrial hearings per month in any one trial department of the Monterey County Municipal Court is approximately 90 to 100. Judge Fields was elected to the Superior Court in November 1994. On January 1, 1995, Judge Alan Hedegard was assigned to assume the responsibilities of Judge Fields' department. During January, two months after the election, there was still a backlog of 210 pretrial hearings on Judge Field's calendar which had been set that month.

18. Under the Election Order, four judges will be on the ballot in 1995. Eight will be on the 1996 ballot. Hence, the disruption described above will be multiplied four-fold in 1995 and eight-fold in 1996. Each one of the judges who must run for election is entitled, and indeed will be required, to conduct a campaign including fundraising, speeches and campaign appearances. Each judge will require time off from his or her calendar and normal duties commencing two to three months before the election to devote energy to reelection both for the primary and the runoff, if necessary. The practical effect of this is disruption of 40 to 80 percent of the Municipal Court's caseload. The two judges who are not up for election in 1996 will not be able to absorb all the cases that cannot be delayed while the other judges are campaigning. The criminal calendar will be affected. (See Judge Fields example above.) Civil litigants will suffer an even greater impact because of the priority that must be given to criminal cases. If eight of the ten judges are running for election in 1996, it is even possible that no Municipal Court civil matters will be heard at all between mid-May and mid-November.

19. As Presiding Judge, I have only one option for

dealing with this situation: request visiting judges to sit in the absence of the judges who are campaigning for election. In my view, at least four to seven visiting judges would be necessary starting the month before the primary through the runoff. However, State budgetary constraints would likely not permit more than one or possibly two. (Visiting judges are paid by the Judicial Council from the State Budget a pro rata share of a judge's full annual salary (\$360 per day) plus per diem (\$37 per day) plus up to \$110 per day for lodging.) As a result, even with one or two visiting judges, the court's cases will not be adjudicated or otherwise resolved within the Judicial Administration Standards. This delay could rise to constitutional dimensions with regard to criminal defendants.

20. The impact is greater for new judges. Generally a new judge is assigned a mentor and devotes several weeks to orientation including attending judge's school and observing other judges prior to assuming independent responsibility for the management of a courtroom calendar and docket. Generally it takes a new judge on average approximately six to nine months to be able to manage efficiently a full caseload with minimal judicial error and maximum effectiveness. The new judges who are elected in 1995 will have just completed orientation and begun to adjudicate cases in their own courtrooms when they will be required to start their 1996 campaigns. If a new 1995 judge is defeated, restabilizing the administration of justice will be further delayed in the Monterey County Municipal Court as the process of orienting and training the new 1996 class of judges must start once again.

21. As Presiding Judge, I wish to intervene in this action in my official capacity to request that the Three-judge Court modify the Election Order to provide six-year terms retroactive to 1994 for judges elected in 1995. Six-year terms will help mitigate the adverse impact of the Election Order. The Monterey County Municipal Court unequivocally supports the Voting Rights Act. However, the disruption caused by the

Election Order does not appear to be necessary to preserve minority voting rights. The requested modification would preserve elections in the minority electoral divisions at the earliest possible time and afford six-year terms retroactive to 1994 to the newly elected judges including those elected in the minority divisions. I am informed that the plaintiffs in this case would not oppose a modification. Also, a modification of the Election Order would be consistent with the state law scheme of six-year terms for municipal court judges. I am also informed that the state Attorney General would not oppose the requested modification.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and of my own personal knowledge except for those matters stated on information and belief and, as to those matters, I believe them to be true. If called as a witness, I could competently testify thereto.

Executed on March 10, 1995, at Salinas, California.

_____/s/
Honorable Stephen A. Sillman
(Declaration of Service Omitted in Printing)

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Judge of the Monterey County
Municipal Court

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

VICKY M. LOPEZ, et al.,

Plaintiffs,

vs.

MONTEREY COUNTY,
CALIFORNIA,

Defendants.

NO.
C-91-20559-
RMW (EAI)
THREE JUDGE
COURT

**REQUEST FOR MODIFICATION OF
DECEMBER 20, 1994 AND JANUARY 10, 1995 ORDERS**

I. INTRODUCTION.

Judge Stephen A. Sillman, Presiding Judge of the Monterey County Municipal Court, respectfully requests that the Three-judge Court modify its December 20, 1994 and January 10, 1995 orders ("Election Order" herein) to provide that the judges subject to election in 1995 serve six-year terms retroactive to 1994. Under the Election Order there is the potential for 21 judicial elections within 18 months for seats on the Municipal Court's 10-judge bench. Eight of the judges will stand for election at the same time in 1996. The time demands for campaigning and fundraising for this number of elections will unnecessarily and unduly burden the ability of the Municipal Court to adjudicate cases within the timelines set forth in the California Rules of Court and poses a threat to the constitutional rights of litigants. Providing six-year terms to the judges subject to election in 1995 will help mitigate this negative impact.

II. DISCUSSION OF IMPACT OF ELECTION ORDER ON ADMINISTRATION OF JUSTICE.

Attached hereto is Judge Sillman's declaration describing at length the impact that the Election Order will have on the official duties of the Monterey County Municipal Court. In summary:

The Election order will unduly burden the Municipal Court's ability to administer justice in a timely fashion by placing potentially four judges on a two-year campaign cycle in 1995 and 1996, and subjecting 80 percent of the judges to election in 1996. The Municipal Court does not have the resources to insure that cases will continue to be adjudicated within the timelines set forth in California Rules of Court with this number of judges involved in campaigns and scheduling time away from their courtrooms.

The California Rules of Court set forth the timelines in which cases should be adjudicated. Section 2.3 provides in pertinent part:

(b) [General civil cases] A

general civil case is any civil case other than a small claims or unlawful detainer case. The goals for general civil cases are:

- (1) 90 percent disposed of within 12 months after filing;
- (2) 98 percent disposed of within 18 months after filing;
- (3) 100 percent disposed of within 24 months after filing

(e) [Misdemeanor cases] The goals for misdemeanor cases are:

- (1) 90 percent disposed of within 30 days after the defendants' first court appearance;
- (2) 98 percent disposed of within 90 days after the defendants' first court appearance;
- (3) 100 percent disposed of within 120 days after the defendants' first court appearance.

(f) [Felony preliminary examinations] The goal for felony filings, excluding murder cases in which the prosecution seeks the death penalty, is disposition (by certified plea, finding of probable cause, or dismissal) of:

- (1) 90 percent within 30 days after the defendants' first court appearance;
- (2) 98 percent within 45 days after the defendants' first court appearance
- (3) 100 percent within 90 days after the defendants' first court appearance.

These timelines protect the constitutional and statutory rights of criminal defendants. (See, e.g., Cal. Const. Art I, § 15, Penal Code §§ 686, 1050, and 1382: speedy trial; Penal Code § 859b: preliminary examination to be held within 10 days of

arraignment or plea; Penal Code §§ 861: restrictions on postponement of preliminary hearings; Penal Code § 1050: restrictions on continuances.) The timelines also ensure access to the courts to civil litigants and expeditious resolution of their causes.

Section 2 of the Appendix of the California Rules of Court provides in relevant part:

Trial courts should be guided by the general principle that from the commencement of litigation to its resolution, whether by trial or settlement, any elapsed time other than reasonably required for pleadings, discovery, and court events is unacceptable and should be eliminated.

Under the Election Order, it is inevitable that the administration of justice will be disrupted in the Monterey County Municipal Court. In the 1992-93 fiscal year, nearly 103,000 cases were filed in the Municipal Court. Of these 93,581 were criminal and 9,237 were civil actions. This is over 8,500 filings per month. Judicial Council standards for adjudication of these cases cannot possibly be met under the campaign/fundraising schedule set in the Election Order. With criminal defendants, delays could have constitutional implications. Civil litigants will suffer a greater impact. Civil litigants' access to the courts will be restricted to accommodate the exigencies of the criminal calendar since continuances in criminal cases are strictly limited by statute. If eight judges must campaign in 1996 primaries and runoffs, only a few statutorily required civil cases would be heard between mid-May and mid-November.

III. REQUESTED MODIFICATION

Intervenor respectfully requests that the Three-judge Court modify its Election Order to provide that the judges subject to election in 1995 be accorded six-year terms

retroactive to 1994, rather than be required to run again in 1996. This would mitigate the impact of the Election Order on the official functions of the Municipal Court. The requested modification would also be consistent with the protection of minority voting rights. The Monterey County Municipal Court unequivocally supports the Voting Rights Act. The proposed modification would preserve the 1995 elections in the minority electoral divisions and afford six-year terms to the newly elected judges from those divisions. The provision for six-year terms is also consistent with the state law which provides for six-year terms for municipal court judges.

There is precedent in California for allowing persons to serve full terms who are elected under a temporary court-ordered districting plan. One example is Assembly v. Deukmejian, 30 Cal.3d 638 (1982). In that case, districting plans for Congress and the state Legislature were suspended by the operation of a statewide referendum. The California Supreme Court, however, adopted the suspended plans as temporary districting plans for the 1992 Congressional and state legislative elections pending the referendum election. The plans were defeated in the referendum election. Nevertheless, the legislators and members of Congress elected under the temporary plans served full terms in office.

Intervenor has been previously informed that counsel for plaintiffs and the Attorney General would not oppose six-year terms for the judges subject to election in 1995. The County itself after its January 24 meeting, instructed County Counsel to request this same modification from the Three-judge Court.

IV. CONCLUSION.

Intervenor respectfully requests that this Court modify its Election Order as set forth above.

DATED: March 10, 1995.

Respectfully submitted,

NIELSEN, MERKSAMER, PARRINELLO,
MUELLER & NAYLOR

By _____/s/_____
Marguerite Mary Leoni
Attorneys for Intervenor
Stephen A. Sillman,
as Presiding Judge of the
Monterey County Municipal Court

(Declaration of Service Omitted in Printing)

Filed
APR 13, 1995
Richard W. Wieking
Clerk, U.S. District Court
Northern District of California
San Jose

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

VICKY M. LOPEZ, CRESCENCIO
PADILLA, WILLIAM A. MELENDEZ,
JESSE G. SANCHEZ, and DAVID
SERENA,

Plaintiffs,

v.

MONTEREY COUNTY,
CALIFORNIA,

Defendant.

NO.
C 91-20559-
RMW (EAI)
ORDER
GRANTING
MOTION TO
INTERVENE
AND
DENYING
MOTION TO
MODIFY
ORDERS
DATED
DECEMBER
20, 1994 AND
JANUARY 10,
1995

On March 10, 1995, Judge Stephen A. Sillman, Presiding Judge of the Monterey County Municipal Court ("Municipal Court"), moved to intervene in his official capacity in this action for the purposes of (1) seeking modification of the court's December 20, 1994 and January 10, 1995 orders (collectively, "the Election Order") and (2) representing the interests of the Municipal Court in future proceedings. Under the modification proposed by Judge Sillman, the terms of office of those elected in 1995 pursuant to the Election Order would be extended from

one year to six years retroactive to 1994. The court set March 29, 1995 as a deadline for responses from any party wishing to either respond to Judge Sillman's motion to intervene or independently move for a modification of the Election Order.

Plaintiffs and the State of California have filed statements of non-opposition to Judge Sillman's proposed intervention and modification of the Election Order. The United States has filed a response in which it urges the court to defer an extension of terms until a later date; the United States does not appear to oppose Judge Sillman's proposed intervention. Defendant Monterey County ("the County") has filed both a motion to modify the Election Order in accordance with Judge Sillman's proposal and an opposition to Judge Sillman's motion to intervene.

In light of Judge Sillman's interest in the efficient administration of the Monterey County Municipal Court, the court grants his motion to intervene in his official capacity as Presiding Judge of the Municipal Court. Judge Sillman's participation in this action is not precluded by the holding in League of United Latin American Citizens v. Clements, 884 F.2d 185 (5th Cir. 1989), where the judges seeking to intervene asserted an interest in the "legislation action" of redistricting, *id.* at 188. Here, by contrast, Judge Sillman is seeking to protect the administration of justice in Monterey County, a concern independent from an interest in the configuration of particular districts.

Additionally, the court denies without prejudice the County's motion to modify the Election Order to extend the terms of those elected in 1995. The court has considered the concerns raised by the County and Judge Sillman about the cost of conducting back-to-back elections in 1995 and 1996, the interference with judicial administration that could result therefrom, and the impracticability of the parties' reaching a permanent solution before 1996. On the other hand, the court is reluctant and unwilling at this time to establish six-year terms

under an election plan that is designed to be an emergency, temporary solution to a problem most appropriately addressed through legislative action.

The court hereby sets a status conference for September 28, 1995 at 1:30 p.m. At least five days before the status conference, each party shall file a statement showing:

(1) what efforts have been made to implement a permanent solution;

(2) whether a permanent plan will be in effect for the 1996 general election; and

(3) if a permanent plan will not be in effect in 1996, when such implementation is anticipated.

Copies of each party's statement should be sent directly to the chambers of each of the judges on the panel.

Dated: 4/10/95

_____/s/
Ronald M. Whyte
United States District Judge
On Behalf of the Panel

Filed

SEP 7, 1995

Richard W. Wieking

Clerk, U.S. District Court

Northern District of California

San Jose

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

Vicky M. Lopez et al.,

Plaintiffs,

v.

Monterey County, California

Defendant.

State of California,
Intervenor-Defendant.

NO.
C-91-20559
RMW (EAI)
Order Re
Briefing
for Status
Conference

The parties are hereby requested to brief the effect of Miller v. Johnson, 95 Daily Journal D.A.R. 8495 on this case in their status conference statements for the status conference on September 28, 1995 at 1:30 p.m.

Dated: 9/6/95

_____/s/
Ronald M. Whyte
United States District Judge
On Behalf of the Panel

Filed
OCT 3, 1995
Richard W. Wieking
Clerk, U.S. District Court
Northern District of California
San Jose

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**
VICKY M. LOPEZ, et al.

Plaintiffs,

v.

MONTEREY COUNTY, CALIFORNIA,

Defendant.

NO.
C-91-20559-
RMW (EAI)
REQUEST
FOR AMICUS
CURIAE
BRIEF FROM
UNITED
STATES

The court does request that the United States submit a brief discussing the effect of Miller vs. Johnson on this case. The court would further request that the brief be filed by October 10, 1995.

Dated: 10/3/95

/s/
Ronald M. Whyte
United States District Judge

Filed
NOV 1, 1995
Richard W. Wieking
Clerk, U.S. District Court
Northern District of California
San Jose

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**
VICKY M. LOPEZ, CRESCENCIO
PADILLA, WILLIAM A. MELENDEZ,
JESSE G. SANCHEZ, and DAVID
SERENA,

Plaintiffs,

v.

MONTEREY COUNTY, CALIFORNIA,
Defendant.

STATE OF CALIFORNIA,
Intervenor-Defendant.

NO.
C-91-20559-
RMW
Voting Rights
Action
Three Judge
Court
ORDER
MODIFYING
INJUNCTION

Background

On December 20, 1994 this court ordered the County of Monterey to hold a special election in 1995 for municipal court judges pursuant to a court-ordered, emergency, interim election plan.¹ The court otherwise enjoined the election of municipal court judges pending the adoption and preclearance of a permanent election plan which complies with the Voting Rights Act and State law. The special election took place on June 6, 1995 and the terms of those elected stand to expire pursuant to the December 20, 1994 order in January of 1997. Monterey

¹ The order was clarified on January 10, 1995 to make clear that the order required a primary election with run-offs thereafter, if necessary.

County has not yet been able to implement a permanent election plan. Therefore, the court faces the difficult question of what to do now.

Position of Parties

The plaintiffs want the court to implement a permanent election plan and to continue in the meantime the implementation of the plan utilized in the June 6, 1995 special election. The County requests that the court extend the terms of those elected, so that it can preclear and judicially validate a permanent plan before another election. The State urges the court to dismiss this Section 5 action as moot because the non-precleared consolidation ordinances were superceded by state law. If the court will not dismiss the action as moot, the State wants: (1) to be joined as a necessary party; (2) to have vacated the court's March 31, 1993 order finding that the County's consolidation ordinances were not precleared; (3) to litigate the merits of the preclearance issues; and (4) to allow county-wide elections in the meantime. Judge Sillman, the current presiding judge of the municipal court, urges that the court order county-wide elections to go forward in March of 1996 as an interim plan and that those elected remain in office for regular six year terms.

Analysis

The court finds this case to be one with no easy solution. We are faced with a Section 5 violation.² No permanent plan can be in place for a March election. A return to the status quo that existed before the enactment of the consolidation ordinances

² The State appears to believe there has been no Section 5 violation that affects the County's ability to hold county-wide judicial elections. At this point the court is not persuaded by the State's position, but the State can now seek to show that the County is merely administering a state law calling for county-wide elections and, therefor, no preclearance requirement is involved.

is not legal, feasible or desired. The Supreme Court in Miller v. Johnson, 115 S.Ct. 2475 (1995), has cast substantial doubt upon the constitutionality of extending the duration of the previously ordered emergency, interim plan, as that plan used race as a significant factor in dividing the County into election areas. Therefore, the court is concerned that extending the terms of those elected would be inappropriate. Under the circumstances, the court concludes that it should allow a county-wide election of municipal court judges in the general election in 1996 but enjoin elections thereafter pending preclearance of a permanent plan that complies with the Voting Rights Act and state law.

The court recognizes that now permitting an election on a county-wide basis raises some legitimate concerns. Although the court has not accepted the stipulation between the County and plaintiffs that the County Board of Supervisors "is unable to establish that the Municipal Court Judicial Court Consolidation Ordinances . . . did not have the effect of denying the right to vote to Latinos in Monterey County due to the retrogressive effect several of these ordinances had on Latino voting strength..." (Monterey County, Cal., Resolution 94-107), the court cannot overlook that stipulation in fashioning a temporary solution. However, this litigation is not a Section 2 proceeding. Further, neither the plaintiffs nor the County suggest that there is any evidence of purposeful discrimination in the enacting of the consolidation ordinances. Finally, Miller raises substantial doubt as to whether legislative division into race based districts or election areas can ever withstand constitutional scrutiny.

Just as the State may not, absent extraordinary justification, segregate citizens on the basis of race in its public parks, New Orleans City Park Improvement Assn. v. Detiege, 358 U.S. 54, 79 S.Ct. 99, 3 L.Ed.2d 46 (1958) (*per curiam*), buses, Gayle v.

Browder, 352 U.S. 903, 77 S.Ct. 145, 1 L.Ed.2d 114 (1956) (*per curiam*), golf courses, Holmes v. Atlanta, 350 U.S. 879, 76 S.Ct. 141, 100 L.Ed. 776 (1955) (*per curiam*), beaches, Mayor and City Council of Baltimore v. Dawson, 350 U.S. 877, 76 S.Ct. 133, 100 L.Ed. 774 (1955) (*per curiam*), and schools, Brown, *supra*, so did we recognize in Shaw that it may not separate its citizens into different voting districts on the basis of race. The idea is a simple one: "At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens 'as individuals, not "as simply components of a racial, religious, sexual or national class." ' " Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 602, 110 S.Ct. 2997, 3028, 111 L.Ed.2d 445 (1990) (O'CONNOR, J., dissenting) (quoting Arizona Governing Comm. for Tax Deferred Annuity and Deferred Compensation Plans v. Norris, 463 U.S. 1073, 1083, 103 S.Ct. 3492, 3498, 77 L.Ed.2d 1236 (1983); cf. Northeastern Fla. Chapter, Associated Gen. Contractors of America v.

Jacksonville, 508 U.S. __, __, 113 S.Ct. 2297, 2303, 124 L.Ed.2d 586 (1993) (" 'injury in fact' " was "denial of equal treatment ... not the ultimate inability to obtain the benefit"). When the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, "think alike, share the same political interests, and will prefer the same candidates at the polls." Shaw, *supra*, at __, 113 S.Ct., at 2827; see Metro Broadcasting, *supra* at 636, 110 S.Ct., at 3046 (KENNEDY, J., dissenting). Race-based assignments "embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts--their very worth as citizens--according to a criterion barred to the Government by history and the Constitution." Metro Broadcasting, *supra*, at 604, 110 S.Ct., at 3029 ("O'CONNOR, J., dissenting) (citation omitted); see Powers v. Ohio, 499 U.S. 400, 410, 111 S.Ct. 1364, 1370, 113 L.Ed.2d 411 (1991) ("Race cannot be a proxy for determining juror bias or competence"); Palmore v.

Sidoti, 466 U.S. 429, 432, 104 S.Ct. 1879, 1881, 80 L.Ed.2d 421 (1984) ("Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category"). They also cause society serious harm. As we concluded in Shaw:

" R a c i a l
classifications
with respect to
voting carry
p a r t i c u l a r
dangers. Racial
gerrymandering,
even for remedial
purposes, may
balkanize us into
competing racial
factions; it
threatens to carry
us further from
the goal of a
political system in
which race no
longer matters--a
goal that the
Fourteenth and
F i f t e e n t h
A m e n d m e n t s
embody, and to
which the Nation
continues to

aspire. It is for
these reasons that
r a c e - b a s e d
districting by our
state legislatures
demands close
judicial scrutiny."
Shaw, *supra*, at
113 S.Ct., at
2832.

Miller, 115 S.Ct. at 2486.

Whether race based election areas can withstand constitutional scrutiny is particularly doubtful when, as here, the legislative body is dealing with the election of judges who serve the entire County and no claim is made that the County itself was configured to deprive any racial or ethnic group of voting power. As pointed out above, Miller cautions that "[w]hen the state assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, 'think alike, share the same political interests, and will prefer the same candidates at the polls.' (citation omitted)." *Id.*

A county-wide election system does not assume that voters of a particular race or ethnicity will vote for the same candidates. It allows each voter one vote for each of the judicial offices. It makes the judges elected responsive to all citizens and avoids any risk of pressure on judges to respond to particular electoral constituents. See, Nipper v. Smith, 39 F.3d 1494, 1542-1547 (11th Cir. 1994).

Plaintiffs and the County contend that a county-wide voting plan cannot be imposed as an interim plan because it would be retrogressive in comparison to the interim, emergency plan implemented by the County after the court's December 20, 1994 order. (The appropriate retrogression comparison "...shall be with the last legally enforceable practice or procedure used by

the jurisdiction." 28 C.F.R. § 51.54(b)). The court doubts whether the prior interim plan can be considered "legally enforceable" within the meaning of the regulation, because it suspended otherwise applicable provisions of state law and was adopted only on an emergency basis. Further, given the reasoning of Miller, the court cannot say that a county-wide election plan is necessarily unlawfully retrogressive in comparison with the prior plan or the system in effect prior to the consolidation ordinances.

The court also has considered the fact that a county-wide election system was the legislative choice of the citizens prior to the filing of this lawsuit. The court certainly recognizes its obligation to protect minority voting rights from unconstitutional action of the majority. However, the court has been presented with no interim plan that it finds more protective of minority voting rights as defined in Miller than the county-wide election plan in force at the time this Section 5 lawsuit was filed.

Since this case is not a Section 2 case and since the County, to its credit, through its Board of Supervisors, still wants to enact an election plan that complies with the Voting Rights Act and state law, the court will defer holding any hearing on a permanent plan. The court also reconsiders its prior decision that the State should not be joined as an indispensable party. Since the State now argues that "in conducting municipal court elections, the County is not 'administering' its consolidation ordinances at all, but is instead 'administering' a *state statute* that defines the municipal court district to encompass the entire county," (State's Status Conference Memorandum, page 2, lines 12-14), the State clearly must be brought into this action in order to bring about a complete resolution of the issues. If the State believes that the County is only administering a State statute and that the failure to preclear the consolidation ordinances is of no significance, it can seek to lift the injunction and have this Section 5 litigation dismissed.

Order

Pursuant to its equitable power to effect a remedy, and for the reasons discussed above, the court modifies its previously issued injunction to allow the county-wide election of municipal court judges at the general election in 1996. The injunction remains in effect thereafter pending preclearance of a permanent plan that complies with the Voting Rights Act and state law. The terms of those elected will be for the normal six year term. All parties have an interest in stability of the court pending the implementation of a permanent election plan.

The court recognizes that the election schedule will have to be shortened somewhat to allow elections in March of 1996. However, the court believes the schedule can be shortened without unduly prejudicing any candidate. The County is hereby authorized to abbreviate the periods in its election calendar to allow all pre-election requirements to be fulfilled before the March 26, 1996 election.

The court vacates its order of March 31, 1993 to the extent it denies the County's motion to join the State as an indispensable party and hereby joins the State.

The court also orders the parties to submit reports by September 6, 1996 outlining the progress that has been made in obtaining a permanent legislative solution.

DATED: 11/1/95

/s/
RONALD M. WHYTE
United States District Judge
On Behalf of the Panel

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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

VICKY M. LOPEZ, *et al.*,

Plaintiffs,

v.

MONTEREY COUNTY, CALIFORNIA;
STATE OF CALIFORNIA,

Defendants.

STEPHEN A. SILLMAN,
Intervenor.

NO.
C-91-20559
RMW
(Three Judge
Court)
STATE OF
CALIFORNIA'S
ANSWER TO
COMPLAINT

COMES NOW defendant STATE OF CALIFORNIA ("State"), pursuant to the Court's November 1, 1995 order joining the State as an indispensable party defendant, and answers the complaint for declaratory and injunctive relief on file in this purported Voting Rights Action as follows:

1. Answering paragraph 1, admits that the statutes, regulations, codes, and/or constitutional provisions

cited therein speak for themselves. The remaining allegations contained in the paragraph 1 are merely argument, requiring no response by defendants; to the extent a response is required, the State denies each and every allegation contained therein.

2. Admits the allegations contained in paragraph 2.

3. Lacks sufficient information or belief to answer the allegations contained in paragraph 3, and, basing denial on that ground, denies each and every allegation contained therein.

4. Admits the allegations contained in paragraph 4.

5. Admits the allegations contained in paragraph 5.

6. Admits the allegations contained in paragraph 6.

7. Answering paragraph 7, admits that the statutes, regulations, codes, and/or constitutional provisions cited therein speak for themselves. The remaining allegations contained in the paragraph 7 are merely argument, requiring no response by defendants; to the extent a response is required, the State denies each and every allegation therein, and specifically denies that the Monterey County Board of Supervisors has any authority whatsoever to create, designate, modify, or consolidate justice court districts.

8. Admits the allegations contained in paragraph 8.

9. Denies each and every allegation contained in paragraph 9.

10. Denies each and every allegation contained in paragraph 10.

11. Denies each and every allegation contained in paragraph 11.

12. Denies each and every allegation contained in paragraph 12.

13. Admits the allegations contained in paragraph 13.
14. Admits the allegations contained in paragraph 14.
15. Admits the allegations contained in paragraph 15; however, defendant denies that, in conducting elections for municipal court judges, the County is implementing Ordinance No. 2524.
16. Denies each and every allegation contained in paragraph 16.
17. Denies each and every allegation contained in paragraph 17.
18. Admits the allegations contained in paragraph 18.
19. Admits the allegations contained in paragraph 19.
20. Admits the allegations contained in paragraph 20; however, defendant denies that, in conducting elections for municipal court judges, the County is implementing Ordinance No. 2920.
21. Denies each and every allegation contained in paragraph 21.
22. Denies each and every allegation contained in paragraph 22.
23. Denies each and every allegation contained in paragraph 23, and specifically and affirmatively alleges that "Monterey County Ordinance Nos. 2139, 2524, and 2930" have in fact been submitted to the United States Attorney General, that these ordinances have received Section 5 approval from the United States Department of Justice, and that plaintiffs have admitted these facts to this Court.
24. Lacks sufficient information or belief to answer the allegations contained in paragraph 24, and, basing denial on that ground, denies each and every allegation contained therein.

25. Denies each and every allegation contained in paragraph 25.
26. Answering paragraph 26, defendant denies that the County implements the alleged ordinances in conducting elections for municipal court judges, and further denies that the alleged ordinances constitute "changes affecting voting" within the meaning of the Voting Rights Act.
27. Answering paragraph 27, admits that plaintiffs have requested the convening of a Three Judge Court to preside over this action.
28. Answering paragraph 28, repeats and incorporates by reference his answers to paragraphs 1 through 27 as if fully set forth herein.
29. Denies each and every allegation contained in paragraph 29.
30. Denies each and every allegation contained in paragraph 30.
31. Denies each and every allegation contained in paragraph 31.
32. Answering paragraph 32, admits that the statutes, regulations, codes, and/or constitutional provisions cited therein speak for themselves. The remaining allegations contained in the paragraph 32 are merely argument, requiring no response by defendants; to the extent a response is required, the State denies each and every allegation contained therein, and specifically and affirmatively alleges that the Monterey County Ordinances cited therein have in fact secured Section 5 approval from the United States Department of Justice and that plaintiffs have admitted this fact to this Court.
33. Answering paragraph 33, the State notes that the allegations contained therein appear to be merely argument, requiring no response by defendants; to the extent a response is required, the State denies each and every allegation contained therein.

AFFIRMATIVE DEFENSES

I.

The complaint is barred by the doctrine of laches.

II.

The complaint has been rendered moot by the March 6, 1995 preclearance of all relevant Monterey County consolidation ordinances by the United States Department of Justice.

III.

The complaint has been further rendered moot by the fact that current elections of municipal court judges in Monterey County are conducted not pursuant to the Monterey County consolidation ordinances which are the subject of this action, but pursuant to superseding state statutes and provisions of the California Constitution. Plaintiffs have not alleged that these state statutes and constitutional provisions required Section 5 approval.

IV.

The complaint is barred by relevant statutes of limitations.

V.

Plaintiffs have failed to allege facts sufficient to state a claim for a race-based remedy.

VI.

No injunctive or other remedial order is appropriate in this action in light of the March 6, 1995 preclearance of all relevant Monterey County consolidation ordinances by the United States Department of Justice.

VII.

The complaint fails to state any claim against the State of California upon which relief of any sort can be granted.

WHEREFORE, defendant STATE OF CALIFORNIA respectfully prays that:

1. The complaint on file herein be dismissed with

prejudice;

2. Judgment be entered against the plaintiffs and in favor of defendant State;

4. Defendant State be awarded its costs of suit incurred herein; and

5. Defendant State be awarded such other and further relief as the Court deems to be proper.

Dated: November 16, 1995

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General of California

LINDA CABATIC
Supervising Deputy Attorney General

MANUEL M. MEDEIROS
Deputy Attorney General

_____/s/
DANIEL G. STONE
Deputy Attorney General

Attorneys for State of California

(Declaration of Service Omitted in Printing)

Filed
NOV 20, 1995
Richard W. Wieking
Clerk, U.S. District Court
Northern District of California
San Jose

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

VICKY M. LOPEZ, CRESCENCIO
PADILLA, WILLIAM A. MELENDEZ,
JESSE G. SANCHEZ, and DAVID
SERENA,

Plaintiffs,

v.

MONTEREY COUNTY, CALIFORNIA,
Defendant.

STATE OF CALIFORNIA,
Intervenor-Defendant.

NO.
C-91-20559-
RMW
Voting Rights
Action
Three Judge
Court
ORDER
CLARIFYING
ORDER
MODIFYING
INJUNCTION

The court hereby clarifies its Order Modifying Injunction which was issued on November 1, 1995.

The first sentence of the section entitled "Order" (page 5, lines 23-25) is deleted and the following is substituted:

Pursuant to its equitable power to effect a remedy, and for the reasons discussed above, the court modifies its previously issued injunction to allow the county-wide election of municipal court judges in 1996 at the March primary with run-offs at the general election in November, if necessary.

The third sentence of that same section (page 5, lines 26-27) is deleted and the following substituted:

The terms of those elected will be normal

six year terms except that they will be deemed to have commenced in January of 1995, the date the terms would have commenced but for the court's previously issued injunction. The one exception is the office now held by Judge Wendy Duffy. Her term expires for the first time in January of 1997. Therefore, the term of the candidate elected to her office will expire in 2003. The terms of the other seven offices up for election will expire in January of 2001.

Dated: 11/20/95

/s/

Ronald M. Whyte
United States District Judge
On Behalf of the Panel

Filed
NOV 21, 1995
Richard W. Wieking
Clerk, U.S. District Court
Northern District of California
San Jose

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

VICKY M. LOPEZ, CRESCENCIO
PADILLA, WILLIAM A. MELENDEZ,
JESSE G. SANCHEZ, and DAVID
SERENA,

Plaintiff,

v.

MONTEREY COUNTY, CALIFORNIA,
Defendants.

STATE OF CALIFORNIA,
Intervenor-Defendant.

NO.
C-91-20559-
RMW
Voting Rights
Action
Three Judge
Court
**ORDER
APPROVING
RESOLUTION
AND
MODIFIED
ELECTION
SCHEDULE**

By its November 1, 1995 order this court modified its previously issued injunction to allow the county-wide election of municipal court judges in 1996. The court also authorized the County to abbreviate the periods in its election calendar to allow all pre-election requirements to be fulfilled before the March 26, 1996 primary. On November 14, 1995 the County Board of Supervisors passed Resolution No. 95-506 to implement the court's order of November 1, 1995 and a modified election schedule. The court hereby approves the resolution and modified election schedule, copies of which are attached hereto.

Dated: 11/21/95

/s/
Ronald M. Whyte
United States District Judge
On Behalf of the Panel

Filed
NOV 30, 1995
Richard W. Wieking
Clerk, U.S. District Court
Northern District of California
San Jose

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

VICKY M. LOPEZ, CRESCENCIO
PADILLA, WILLIAM A. MELENDEZ,
JESSE G. SANCHEZ, and DAVID
SERENA,

Plaintiff,

v.

MONTEREY COUNTY, CALIFORNIA,
Defendants.

STATE OF CALIFORNIA,
Intervenor-Defendant.

NO.
C-91-20559-
RMW
Voting Rights
Action
Three Judge
Court
ORDER
DENYING
MOTION FOR
RECONSIDER-
ATION

The motion for reconsideration is denied. The court's Order Modifying Injunction filed November 1, 1995 was not based on any assumption that county-wide elections for municipal court judges had been precleared. The order reflects what the court believes is the appropriate temporary, equitable remedy pending preclearance of a plan that complies with the Voting Rights Act and does not violate state law.

DATED: November 30, 1995 /s/

JAMES WARE
United States District Judge
For the Panel

Filed
JAN 02, 1996
Richard W. Wieking
Clerk, U.S. District Court
Northern District of California
San Jose

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

VICKY M. LOPEZ, CRESCENCIO
PADILLA, WILLIAM A. MELENDEZ,
JESSE G. SANCHEZ, and DAVID
SERENA,

Plaintiffs,

v.

MONTEREY COUNTY, CALIFORNIA,
Defendant.

STATE OF CALIFORNIA,
Intervenor-Defendant.

NO.
C-91-20559-
RMW
Voting Rights
Action
Three Judge
Court
ORDER
DENYING
REQUEST
FOR STAY

Plaintiffs' expedited motion for a stay pending appeal is denied.

DATED: 12/29/95

 /s/
RONALD M. WHYTE
United States District Judge
On Behalf of the Panel

8
No. 95-1201

Supreme Court, U.S.
FILED

MAY 31 1996

CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

VICKY M. LOPEZ, CRESCENCIO PADILLA,
WILLIAM A. MELENDEZ, and DAVID SERENA, *Appellants*,

v.

MONTEREY COUNTY, CALIFORNIA,
STATE OF CALIFORNIA, *Appellees*,

and

STEPHEN A. SILLMAN, *Intervenor-Appellee*

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR APPELLANTS

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QUESTION PRESENTED FOR REVIEW

WHETHER IN AN ACTION TO ENJOIN A CHANGE FROM DISTRICT TO AT-LARGE JUDICIAL ELECTIONS THAT HAS NOT BEEN PRECLEARED PURSUANT TO SECTION 5 OF THE VOTING RIGHTS ACT, A DISTRICT COURT HAS THE AUTHORITY TO ORDER IMPLEMENTATION OF THE UNPRECLEARED CHANGE AS A COURT-ORDERED PLAN.

List of All Parties in Lower
Court Proceedings

The following is a list of all the parties to the proceeding
in the Court whose interlocutory order is under review:

Appellants:

Vicky M. Lopez, Crescencio Padilla, William A.
Melendez, and David Serena. [Jesse G. Sanchez,
a plaintiff in the action filed below, passed away
prior to the filing of this appeal by the
Appellants. Appellants will be amending their
complaint to remove Jesse G. Sanchez as a
plaintiff in this action.]

Appellees:

Monterey County, California and the State of
California.

Intervenor-Appellee

Stephen A. Sillman.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF ALL PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	vi
OPINIONS AND ORDERS BELOW	1
STATEMENT OF JURISDICTION	2
STATUTORY PROVISIONS & FEDERAL REGULATIONS	2
STATEMENT OF THE CASE	2
Introduction	2
Relevant Facts	5
Procedural History	7
SUMMARY OF ARGUMENT	21
ARGUMENT	22

Table of Contents
Cont'd

I.	THE DISTRICT COURT ERRED IN ORDERING ELECTIONS TO BE CONDUCTED PURSUANT TO VOTING CHANGES SUBJECT TO, BUT NOT PRECLEARED UNDER, SECTION 5	22
II.	NO "EXTREME CIRCUMSTANCES" EXIST THAT COULD JUSTIFY THE USE OF UNPRECLEARED ELECTION CHANGES	26
A.	None of the Factors Cited by the District Court Justifies the Use of Unprecleared Election Changes	27
B.	<i>Miller</i> Does Not Require the Use of Unprecleared Election Changes	29
C.	Given the Absence of "Extreme Circumstances," the District Court Should Have Extended the Terms of Judges Elected in June 1995 Until the County and State Presented a Plan Which Received Section 5 Preclearance ..	35
III.	THE DISTRICT COURT ERRED BY FAILING TO FOLLOW THE STANDARDS ESTABLISHED FOR COURT-ORDERED PLANS	37

Table of Contents
Cont'd

A.	The District Court Failed to Incorporate Section 5 Standards	38
B.	The District Court Failed Even to Examine Whether Its Court-Ordered Remedy Might Violate Section 2	42
C.	The District Court Failed to Adhere to This Court's "Strong Preference" for Single-Member Districts	44
	CONCLUSION	45

TABLE OF AUTHORITIES

Cases

<i>Allen v. State Board of Elections</i> , 393 U.S. 544, 555 (1969)	23, 34
<i>Brooks v. State Bd. of Elections</i> , 775 F.Supp. 1490 (S.D.Ga. 1989), <i>aff'd mem.</i> , 498 U.S. 916 (1991)	36
<i>Brooks v. State Bd. of Elections</i> , 790 F.Supp. 1156 (S.D. Ga. 1990)	22, 35 - 36
<i>Campos v. City of Houston</i> , 968 F.2d 446 (5th Cir. 1992), <i>cert. denied</i> , 113 S.Ct. 971 (1993)	25
<i>Chapman v. Meier</i> , 420 U.S. 1 (1975)	45
<i>Clark v. Roemer</i> , 500 U.S. 646 (1991)	3, 21 - 23, 26, 35
<i>Connor v. Finch</i> , 431 U.S. 407 (1977)	37, 45
<i>Connor v. Johnson</i> , 402 U.S. 690, 692 (1971)	44, 45
<i>Connor v. Waller</i> , 421 U.S. 656 (1973)	23, 28, 34
<i>Dewitt v. Wilson</i> , 856 F.Supp. 1409 (E.D.Cal. 1994), <i>aff'd in relevant part and dismissed in part</i> , 115 S.Ct. 2637 (1995)	31-32
<i>East Carroll Parish School Bd. v. Marshall</i> , 424 U.S. 636 (1976)	45
<i>Edge v. Sumter County School District</i> , 775 F. 2d 1509 (11th Cir. 1985)	39, 42 - 43

Table of Authorities Cases Cont'd

<i>Jordan v. Winter</i> , 604 F.Supp. 807 (N.D.Miss. 1984), <i>aff'd sub nom.</i> , <i>Mississippi Republican Executive Committee v. Brooks</i> , 469 U.S. 1002 (1984)	43
<i>Lopez v. Monterey Co.</i> , 871 F.Supp. 1254 (N.D.Cal. 1994)	<i>passim</i>
<i>Mahan v. Howell</i> , 410 U.S. 315 (1973)	45
<i>McCain v. Lybrand</i> , 465 U.S. 236 (1984)	24
<i>McDaniel v. Sanchez</i> , 452 U.S. 130 (1981)	39 - 40
<i>Miller v. Johnson</i> , 115 S.Ct. 2475 (1995)	17 - 20, 22, 27, 29-33
<i>Perkins v. Matthews</i> , 400 U.S. 379 (1971)	23
<i>South Carolina v. Katzenbach</i> , 383 U.S. 301 (1966)	21, 23
<i>State of Mississippi v. Smith</i> , 541 F.Supp. 1329 (D.D.C. 1982), <i>appeal dismissed</i> , 461 U.S. 912 (1983)	41
<i>State of Mississippi v. United States</i> , 490 F.Supp. 569 (D.D.C. 1979), <i>sum. aff'd</i> , 444 U.S. 1050 (1980)	41
<i>State of Texas v. United States</i> , 785 F.Supp. 201 (D.D.C. 1982)	41
<i>Thornburg v. Gingles</i> , 478 U.S. 30 (1986)	44
<i>U.S. v. Board of Supervisors</i> , 429 U.S. 642 (1977)	23, 34

**Table of Authorities
Cases Cont'd**

<i>Upham v. Seamon</i> , 456 U.S. 37 (1982)	39, 42
<i>Wilkes County, Georgia v. United States</i> , 450 F.Supp. 1171, 1176 (D.D.C. 1978), <i>aff'd mem.</i> , 439 U.S. 999 (1978)	42
<i>Wilson v. Eu</i> , 4 Cal. Rptr. 2d 379 (1992)	31 - 32
<i>Wise v. Lipscomb</i> , 437 U.S. 535 (1978)	37, 44

California Constitutional Provisions

Article VI, Section 5	10, 15, 16
Article VI, Section 5 (a)	10
Article VI, Section 5 (b)	3
Article VI, Section 5 (d)	15
Article VI, Section 15	15
Article VI, Section 16(b)	6 - 10, 14, 16
Article VI, Sections 16 (d)	6
Article XXI	31

**Table of Authorities
Cont'd**

Federal Statutes

28 U.S.C. § 1253	2
28 U.S.C. § 2101(b)	2
42 U.S.C. § 1973	19
42 U.S.C. § 1973c	<i>passim</i>

Federal Regulations

28 C.F.R. Appendix to Part 51.	3
28 C.F.R. § 51.54(b)	2, 20, 41

Legislative History

Senate Report No. 94-295, 94th Cong., 1st Sess., at 19 (July 22, 1975)	38
"Extension of the Voting Rights Act of 1965," Hearings Before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, 94th Cong., 1st Sess. (1975)	38 - 39

Table of Authorities
Cont'd

State Statutes

Cal. Civ. Proc. Code § 84	15
Cal. Gov. Code § 71140	10
Cal. Gov. Code § 71145	36

No. 95-1201

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

VICKY M. LOPEZ, CRESCENCIO PADILLA,
WILLIAM A. MELENDEZ, and DAVID SERENA,
Appellants,

v.

MONTEREY COUNTY, CALIFORNIA,
STATE OF CALIFORNIA, *Appellees,*

and

STEPHEN A. SILLMAN, *Intervenor-Appellee*

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT
OF CALIFORNIA

BRIEF FOR APPELLANTS

OPINIONS AND ORDERS BELOW

This appeal seeks to review the Order Modifying Injunction filed by the United States District Court for the Northern District of California on November 1, 1995. The November 1, 1995, Order is not reported and is reprinted in the Joint Appendix (hereinafter cited as Jt. App.). Jt. App. 165.

The Order modified a previous Order filed on December 20, 1994, which enjoined elections to the Monterey County Municipal Court District except for a special election held on June 6, 1995. Jt. App. 123; 871 F.Supp. 1254 (N.D.Cal. 1994).

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to 42 U.S.C. § 1973c and 28 U.S.C. § 1253 to review the November 1, 1995, Order. The November 1, 1995, Order was entered on November 9, 1995. The district court denied Appellants' Motion for Reconsideration on November 30, 1995. Jt. App. 184. The notice of appeal was filed on November 30, 1995. Appellants' Jurisdictional Statement Appendix 26 (hereinafter cited as J.S. App.); 28 U.S.C. § 2101(b).

STATUTORY PROVISIONS FEDERAL REGULATIONS

42 U.S.C. § 1973c. See J.S. App. 85.

28 C.F.R. § 51.54(b). See J.S. App. 87.

STATEMENT OF THE CASE

Introduction

This case involves an appeal from a district court order to implement an election plan that has not been approved pursuant to Section 5 of the Voting Rights Act and which Monterey County admitted could not be approved because it was retrogressive.

Plaintiffs, who are Latino voters of Monterey County, California, filed this action on September 6, 1991. Jt. App. 27.

The case seeks injunctive relief against implementation of a voting change from district to at-large, countywide election of municipal court judges without the preclearance required by Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c.

Monterey County, California ("County"), is a political subdivision subject to the Section 5 preclearance provisions. The County became subject to Section 5 on November 1, 1968. 28 C.F.R. Appendix to Part 51. Section 5 requires the County to secure an administrative ruling from the United States Attorney General or a declaratory judgment from the District Court for the District of Columbia that a covered voting change does not have the purpose nor the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. 42 U.S.C. § 1973c. Such a voting change cannot be used in any elections until Section 5 approval is secured. *Clark v. Roemer*, 500 U.S. 646, 652 - 653 (1991).

The three-judge court¹ initially held that a series of voting changes, consisting of county ordinances which consolidated municipal court districts and justice court districts into one countywide municipal court district,² were subject to the Section 5 preclearance provisions but had not received Section 5 approval. J.S. App. 47 - 59. The consolidation ordinances reduced the number of election districts containing

¹ Actions to enforce Section 5 require the convening of a three-judge court. 42 U.S.C. § 1973c.

² An amendment to the California Constitution abolished justice court judgeships and their functions were transferred to municipal court judgeships. Article VI, § 5 (b), California Constitution.

a majority of Latino eligible voters from three³ to zero (the County contained a 17% Latino eligible voter population, J.S. App. 91). Subsequently, the County sought judicial preclearance from the District Court for the District of Columbia. *Monterey County v. United States*, Civ. Act. No. 93-1639 (D.D.C. filed August 10, 1993). The action was voluntarily dismissed after the County acknowledged that it was not able to demonstrate, as required by Section 5, that several of the ordinances did not have a retrogressive effect on Latino voting strength. Jt. App. 125 - 126.

After repeated efforts by the County and Appellants to secure court approval of a proposed election plan, Jt. App. 126 - 127, the district court ordered the County to implement a previously submitted division election plan in a special judicial election to be held on June 6, 1995. Jt. App. 137. Under the division plan, there continued to be a single countywide municipal court. Jt. App. 133. However, judges would be elected from four divisions, two of which had a majority of Latino eligible voters. Jt. App. 126 - 127. The division plan received Section 5 approval from the Attorney General. J.S. App. 53 - 55. As a result of appointments by Governor Wilson and the special election, for the first time in the history of the County, two Latino judges now serve on the municipal court. J.S. App. 111. The terms of the judges elected in the special judicial election will expire in January 1997. Jt. App. 137.

On November 1, 1995, without the benefit of an evidentiary hearing, the district court decided that the division

³ Prior to the consolidations, the district plan in effect in 1968 provided for three districts with a majority of Latino eligible voters. Jt. App. 129; Intervenor-Appellee Stephen A. Sillman's Motion to Dismiss or Affirm ("Intervenor Sillman's App.") Appendix 50a.

plan's constitutionality was in doubt and consequently, issued an Order reverting to a countywide election for municipal court judges. Jt. App. 165 - 173. The district court's Order results in the implementation of an at-large election system which has not received Section 5 preclearance. The district court's Order is contrary to this Court's precedent in *Clark* and should be reversed.

Relevant Facts⁴

The County, according to the 1990 Census, had a 34% Latino population, J.S. App. 94, and a 17% Latino eligible voter population. J.S. App. 91. From 1980 to 1990, the Hispanic Origin population growth rate was 59.1% while the white non-Hispanic population growth rate was 7.3%. J.S. App. 94. This Hispanic Origin population is geographically concentrated in the eastern part of the City of Salinas, the Castroville-Pajaro Valley north county area, and the south county area which includes the Cities of Gonzales, Soledad, Greenfield, and King City. J.S. App. 95.

The socioeconomic status of the Latino population in the County hinders their ability to effectively participate in the political process. J.S. App. 99 - 103. In 1990, Latinos constituted only 19% of persons over the age of 25 years who completed four years of high school and only 5% of those persons who had a bachelor's degree. J.S. App. 99 - 100. Approximately 92% of the total civilian force was employed, while only 27% of the Hispanic Origin labor force was employed in 1990. J.S. App. 101. Latinos also experience higher poverty rates. For 1990, 12% of the total population in the County was below the poverty level, while the comparable figure for Latinos

⁴ All of the facts highlighted in this subsection were the subject of stipulations between Appellants and the County.

was 21%. J.S. App. 101. The mean income in 1989 for Hispanic Origin households (\$ 32,233) was significantly less than the figure for all households in the County (\$ 43,185). J.S. App. 102. As to English language skills in 1990, there was a significant number of Latinos five years and over who spoke Spanish at home and did not speak English well or at all (31,432) and a smaller number (29,636) who were classified as linguistically isolated. J.S. App. 102. Overcrowding also is a serious issue as the total number of persons per occupied housing unit for the County was 2.96 in 1990, while the comparable figure for the Hispanic Origin population was 4.34. J.S. App. 103.

These depressed socioeconomic characteristics for Latinos in the County not only contribute to but are reflective of the lack of Latino access to the political process. At the time of filing this action on September 6, 1991, there had never been a Latino municipal court judge in the County. J.S. App. 103. Membership on the municipal court is secured by election or, in the case of interim vacancies, by way of a gubernatorial appointment. Article VI, Section 16 (b) & (d), California Constitution. State governors had never appointed a Latino to serve on the municipal court and the only two Latino candidates for the municipal court lost in the 1986 elections. J.S. App. 103. There was a similar absence of Latino representation on the County's Board of Supervisors from 1890 to 1992. J.S. App. 98.

Elections in the County are characterized by Anglo bloc voting which has defeated the electoral choices of the Latino community. J.S. App. 96 - 97. This Anglo bloc voting coupled with a numbered place system for electing municipal court judges has impaired the opportunity of Latinos to elect candidates of their choice. J.S. App. 96, 99.

Latinos also have experienced discrimination that has affected their rights to effectively participate in the political process. An English literacy test, a prerequisite to voting in 1895 and enforced as late as the 1960s, has served to discriminate against Latinos. J.S. App. 97. Moreover, on two separate occasions, the Attorney General, pursuant to Section 5, issued letters of objection disapproving an inadequate bilingual election procedure and a county board of supervisor redistricting plan which divided a politically cohesive Latino community. J.S. App. 97 - 98. Finally, the County has stipulated that it is unable to prove, as required by Section 5, that several of the County's consolidation ordinances at issue herein did not have a retrogressive effect on Latino voting strength. J.S. App. 98 - 99.

Procedural History

On November 1, 1968, the date of Section 5 coverage for the County, there were two municipal court districts and seven justice courts in the County. Jt. App. 129, n. 3. Each of the municipal court districts and the justice court districts comprised separate election districts. By 1983, the consolidation ordinances had produced one countywide municipal court district, effectively altering the method of electing municipal court judges from district elections to a single at-large or countywide election system. Jt. App. 125.

After the three-judge panel of the district court ruled that these ordinances were subject to Section 5 preclearance, Jt. App. 47 - 59, and the County voluntarily dismissed its judicial preclearance action, Jt. App. 125 - 126, the Appellants and the County on November 22, 1993 submitted to the district court their Parties Stipulation and Court Order. The proposed stipulation sought to suspend the application of Article VI, Section 16(b) of the California Constitution, thereby permitting

the Appellants and the County to implement an election plan consisting of seven election areas.⁵ Under the proposed election area plan, three of the election areas would each elect two municipal court judges and four of the election areas would elect a single municipal court judge. In addition, some of the election area boundaries divided municipalities. Candidates for these election areas did not have to reside in the election area, but did have to reside within the County. The election areas were to be used only for the purpose of electing judges. Under the proposal, the County continued to have a single countywide judicial district.⁶ Intervenor Sillman's App. 3a - 10a.

After the first proposal was filed, the State of California intervened and opposed the election area plan. Jt. App. 60 - 68. The State argued that the separation of the electoral and jurisdictional bases of municipal court judges violated Article VI, Section 16 (b) in that the election areas were smaller than the court's countywide jurisdiction. Jt. App. 66. The State also argued that the plan would undermine the administration of justice, since the authority of the judges was not conferred by a district-wide election as envisioned by the state constitution. Jt. App. 66.

On December 22, 1993, the district court declined to

⁵ There was a question as to whether Article VI, Section 16(b) required elections for municipal court judges to be held district-wide.

⁶ The Appellants stipulated that no evidence had been discovered showing that the County had adopted the ordinances pursuant to a discriminatory purpose. The County also stipulated that it could not demonstrate that several of these ordinances did not have a retrogressive effect on Latino voting strength. Intervenor Sillman's App. 4a.

approve the Parties Stipulation and Court Order. The district court concluded that the proposed plan appeared to conflict with Article VI, Section 16(b) by separating the electoral base from the municipal court's jurisdictional base. The district court was not satisfied that an election plan could not be developed that complied with both Section 5 standards and with state constitutional requirements. The parties were given another opportunity to submit a new plan consisting of municipal court districts which were configured "so as to safeguard minority rights." Jt. App. 70.

On January 13, 1994, the Appellants and the County submitted the Parties Second Stipulation and Court Order. The second proposal maintained a single countywide municipal court district that would be divided into four divisions solely for the purposes of the electoral process. By keeping a single countywide district for jurisdictional purposes, the parties sought to avoid any conflict with state constitutional provisions. Intervenor Sillman's App. 13a.

Under the proposed division plan, three of the election areas would each elect one judge and the remaining division would elect seven judges. Some of the boundaries of the divisions divided municipalities. Candidates for these divisions did not have to reside in the election area, but had to reside within the County.⁷ Intervenor Sillman's App. 16a.

The State of California objected to this second proposal. Jt. App. 76. The State argued that the division plan did not

⁷ As with the first proposal, the Second Stipulation contained the same language regarding the absence of any discriminatory purpose in the adoption of the consolidation ordinances and the inability of the County to meet the Section 5 retrogression standard. Intervenor Sillman's App. 12a.

maintain a linkage between a judge's electoral and jurisdictional bases. Jt. App. 81. The State also argued that some of the divisions contained less than 40,000 individuals thereby violating the population requirements for a municipal court district specified in Article VI, Section 5 of the California Constitution. Jt. App. 82. The State also opposed the splitting of the City of Salinas in the proposed division plan as contrary to Article VI, Section 5 (a) of the California Constitution, which prohibits the splitting of any municipality into two or more municipal court districts. Jt. App. 83. In addition, the State objected to the absence of any requirement that a judicial candidate reside in the division for which the candidate seeks election, contrary to California Government Code Section 71140, which requires candidates to be residents of the judicial district. Jt. App. 84.

On March 1, 1994, the district court filed an Order declining to approve the Second Stipulation and Court Order. Jt. App. 88 - 92. The district court was again not satisfied that an election plan could not be developed which complied with both state constitutional requirements and Section 5 standards. The district court ordered the County to submit a new plan that met both state and federal law requirements. If such an election plan could not be submitted, the County was to show cause by "affidavits, stipulation of the parties, or other admissible evidence," Jt. App. 91, why it could not do so.

Pursuant to the district court's March 1, 1994, Order, the Appellants and the County filed a series of factual stipulations demonstrating that an election plan, which complied with Section 5 standards, could not be developed while also adhering to Article VI, Sections 16(b) and 5 of the California Constitution. J.S. App. 92 - 108. Additional stipulations relating to demographic information, the presence of politically cohesive Latino communities and Anglo bloc voting, a legacy of discrimination affecting the right to vote, the use of

discriminatory numbered places, and the presence of socioeconomic disparities between the Latino community and the non-Latino community, were also filed. *See* Stipulations Nos. 3, 4, 5, 6, 7, 8, 9, 10; J.S. App. 94 - 99.

In addition, the County stipulated that the Board of Supervisors was unable to prepare a plan that did not conflict with at least one state law and still comply with Section 5 standards. Stipulation No. 15; J.S. App. 107. As support, the County presented 10 maps which consisted of alternative election plans. All of these plans demonstrated that the interests advanced by both state and federal laws could not be accommodated in a single plan. Stipulation Nos. 14 a, through 14 k; J.S. App. 104 - 107.

The State of California filed a response to these stipulations. While the State noted, "Nothing herein should be construed, however, to reflect agreement by the State's concurrence in the County's stipulation," the State did not object to specific stipulations. Jt. App. 94.

On May 3, 1994, the district court filed a Tentative Order. Jt. App. 96. This Tentative Order required the County to conduct a municipal court election pursuant to an interim plan pending legislative action on a permanent plan. The interim plan consisted of a countywide election. Under this plan, those municipal court judges elected would have their terms shortened. The district court noted: "The court is cognizant of the fact that the interim plan fails to fully address plaintiffs and Monterey County's concerns or remedy the apparent retrogressive effect several of the consolidation ordinances have on Latino voting strength in Monterey County." Jt. App. 99. Despite these reservations, the district court concluded that a countywide method of election provided a "mechanism to ensure the citizens' right to elect judges while an appropriate legislative

solution to the problem is devised." Jt. App. 99. The adverse effects of this interim plan, in the district court's view, were diminished because of the shortening of judicial terms for those municipal court judges elected. The district court noted that the exigency of an imminent election and the absence of any viable options justified the use of an election plan which "may be legally infirm." Jt. App. 100. The district court also stated that the various proposals presented by the Appellants and the County "would alter the [judicial election] structure embodied in the California Constitution and statutes, would do too much violence to legislative and state interests, and would create more problems than it solves." Jt. App. 100 - 101. The district court invited responses from the parties to the Tentative Order.

After receiving responses from the parties and the United States as *amicus curiae*, the district court on June 2, 1994, vacated its previous Tentative Order and enjoined the County from conducting elections for municipal court judges until either a plan secures Section 5 preclearance or until further order from the district court. Jt. App. 103 - 110. The district court held: "The court is now convinced that permitting the voters to cast ballots under a[n at-large election] plan that has not been precleared and that has an apparent retrogressive effect on Latino voting strength would not be in the best interests of the voters." Jt. App. 106. The district court also repeated its reservations regarding the use of any of the proposals advanced by the Appellants and the County. In addition, the district court observed that a return to the election system in place on November 1, 1968, the date that the County became subject to Section 5, was "not a workable interim solution." Jt. App. 107.

The district court invited the parties, as well as the State of California and the United States, to develop an election plan

which complied with Section 5 standards.⁸ If a legislative solution was not forthcoming, the district court stated that it might implement a court-ordered plan.⁹ The district court scheduled a status conference for November 3, 1994, to determine what steps had been taken to develop a permanent plan. Jt. App. 109.

At the status conference, the County related its good faith efforts to secure changes in the California Constitution which would permit the County to adopt a plan which did not violate federal law. These efforts were unsuccessful. Jt. App. 128. The State Legislature did not even place before the voters any proposed constitutional amendments which addressed the County's obligation to develop a plan which complied with both state and federal laws.

On December 20, 1994, to avoid any further delay in elections for municipal court judges, the district court ordered a special judicial election scheduled for June 6, 1995. The

⁸ The district court emphasized the importance of the State's participation in any proceedings to develop a new election plan: "The court finds that it would be beneficial for the State and the United States to assist the County in the development and expedited preclearance of a plan that will comply with the Voting Rights Act and with federal and California state law (or at least minimally intrude on state policy)." Jt. App. 108 - 109 (footnote omitted).

⁹ The district court also denied Appellants' motion to vacate recent judicial appointments made by Governor Pete Wilson or to shorten the terms of those judicial appointees. The district court, however, stated that any judicial appointees would "have to face election under the new redistricting plan." Jt. App. 109.

district court further ordered the County to implement, on a temporary basis, the division plan submitted as part of the Appellants' and the County's Second Stipulation and Court Order. Jt. App. 123, 137.

In ordering a division plan, the district court carefully considered several alternatives. Preliminarily, the district court noted that continuing the injunction without any election pending Section 5 approval of a permanent plan would deprive voters of their right to elect judges. Jt. App. 129. Moreover, "temporary relief [was] ... necessary to enable elections to go forward at [that] ... time without violating the Voting Rights Act." Jt. App. 131, n. 5. The district court also concluded that a return to the election plan in place on November 1, 1968, was "impractical." Jt. App. 128 - 129. Further, the district court was reluctant to implement an at-large election as an interim plan "in light of the supported stipulation that such a plan would be retrogressive in terms of Latino voting strength." Jt. App. 130, n. 4.

Ultimately, the district court narrowed its options to two choices — the multiple municipal court district approach and the division approach. Implementation of the multiple district approach would pose significant administrative problems.¹⁰ The division approach would avoid these administrative problems but would involve a departure from the constitutional provision requiring linkage between a judge's electoral and jurisdictional bases, Article VI, Section 16 (b). Both options would require a

¹⁰ The district court noted that such an approach would require "substantial administrative changes," such as the reassignment of personnel, and establishing new administrative procedures, and "would significantly interfere with the County's ability to provide uninterrupted efficient and effective delivery of municipal court services." Jt. App. 133.

departure from the state constitutional provision, Article VI, Section 5, regarding the splitting of municipalities. Jt. App. 130 - 133.

In deciding in favor of the division approach, the district court found that the "division plan allows the County to continue administratively operating the municipal courts in the county as it currently does." Jt. App. 133. The district court then examined the asserted interests advanced by the state constitutional provisions. With respect to the prohibition of splitting city boundaries, the district court concluded that such a policy did not appear compelling, since the state constitution permitted any city in San Diego County to be divided into more than one municipal court district " 'if the Legislature determines that unusual geographic conditions warrant such division.' " *Id.*, quoting Cal. Const. Art. VI, § 5 (d).

With respect to the asserted state interest in maintaining linkage between jurisdictional and electoral bases, the district court, noting that "the intrusion on state law does not seem as substantial as it initially appears," underscored the common practice of the Chief Justice of the California Supreme Court of assigning municipal court judges from one district to serve on another municipal court district or in another county. Jt. App. 134 - 135. Based upon these judicial assignments, the district court concluded: "Therefore, as a practical matter, linkage between a judge's electoral and jurisdictional bases cannot be considered an overwhelmingly strong public policy . . . [T]here is no strict linkage presently existing in California courts." Jt. App. 135.¹¹ In summary, the absence of any compelling state

¹¹ The district court's conclusions were also supported by the fact that the jurisdiction of a municipal court judge is statewide, Cal. Civ. Proc. Code § 84, and that pursuant to Article VI, Section 15 of the California Constitution, the Chief

policies supported the district court's decision to implement the division plan on an interim basis.¹² The district court also enjoined any future municipal court elections pending the adoption of a Section 5 precleared plan or until further order. Jt. App. 137.

In the December 20, 1994, Order, the district court also suggested that the County seek Section 5 preclearance of its proposed division plan. Jt. App. 136 - 137. Accordingly, the County submitted the division plan to the Attorney General for Section 5 preclearance. On March 6, 1995, the Attorney General precleared the division plan. J.S. App. 53 - 55.

After the filing of the December 20, 1994, Order, the Honorable Stephen A. Sillman, Presiding Judge of the Monterey County Municipal Court, moved to intervene to secure a modification to the terms of office for the newly elected judges. The Presiding Judge sought to extend the terms to six years retroactive to 1994. Jt. App. 152.

Subsequently, the district court on April 13, 1995, filed an Order granting the Presiding Judge his application for intervention in an official capacity. Jt. App. 160 - 163. The district court also denied his motion to modify the terms of the newly elected judges. Since the implementation of the division plan was to be a temporary solution, the district court was reluctant to extend any judicial terms. The district court

Justice of the California Supreme Court can assign a municipal court judge to serve on any court in the state. Jt. App. 134.

¹² In ordering a special election, the district court permitted the County to avoid the application of Sections 5 and 16(b) of Article VI of the California Constitution in adopting the temporary division plan. Jt. App. 133 - 135.

expected the parties to agree on a permanent plan in time for the March 26, 1996, primary election. A status conference was scheduled for September 28, 1995. Jt. App. 161 - 162. As the result of this Court's decision in *Miller v. Johnson*, 115 S.Ct. 2475 (1995), the district court requested additional briefing on the impact of *Miller*. Jt. App. 163, 164.

At the September 28, 1995, status conference, the parties informed the district court of their respective positions as to the issuance of another interim remedy since the County and the State had not developed a permanent plan. The Presiding Judge requested that elections proceed on an at-large election basis with those judges elected serving full six-year terms. Jt. App. 166. The State suggested that an appropriate remedy would be either a countywide election or a return to the election plan in effect on November 1, 1968. Record, Reporter's Transcript of Proceedings, September 28, 1995, Docket Entry No. 161, at 8 [hereinafter cited as September 28, 1995, Transcript]. In addition, the State requested that this Section 5 action be dismissed as moot, because the County was conducting municipal court elections pursuant to state statutes precleared under Section 5. If the action was not dismissed, the State requested to be joined as a necessary party and to be permitted to relitigate the merits of the Section 5 preclearance issues. Jt. App. 166. The County requested that the terms of the newly elected judges be extended to permit the development of a permanent plan. September 28, 1995, Transcript at 17.

The Appellants requested that the district court conduct an evidentiary hearing prior to issuing any court-ordered remedy. September 28, 1995, Transcript at 30. The Appellants also requested that judicial terms be extended until a permanent election plan could be implemented. Alternatively, the Appellants supported the position of the County. September 28, 1995, Transcript at 31.

The district court never conducted the evidentiary hearing, as requested by Appellants, prior to ordering implementation of an unprecleared at-large plan. Instead, on November 1, 1995, the district court filed an Order modifying the injunction granted on December 20, 1994. Jt. App. 165. The district court recognized that there was a continuing Section 5 violation. Jt. App. 166. The district court also found that no permanent plan could be implemented in time for the March 26, 1996, elections. Moreover, a return to the election plan existing on November 1, 1968, was "not legal, feasible or desired." Jt. App. 167. Finally, the district court declined to extend the terms of the newly elected judges which were due to expire in January 1997. Jt. App. 173.

The basis for the district court's ruling was its expressed concerns regarding the constitutionality of the temporary division plan. Citing this Court's decision in *Miller*, the district court concluded that there is substantial doubt that race-based districts "can ever withstand constitutional scrutiny."¹³ Jt. App. 161. Notwithstanding the absence of preclearance for countywide elections, the district court ordered the County to conduct municipal court elections on a countywide basis in the upcoming March 26, 1996, elections with any run-off elections to be held on November 5, 1996. Jt. App. 180.

In ordering countywide elections, the district court did

¹³ The district court assumed that the temporary division plan implemented in the special June 6, 1995, municipal court elections was in fact race-based. Jt. App. 167. The basis for the district court's conclusion appears to be the statement made by the County's counsel at the September 28, 1995, Status Conference who stated that race was the "sole motivation" for the configuration of the various divisions. September 28, 1995, Transcript at 16.

recognize that the implementation of at-large elections in the County raised "some legitimate concerns." Jt. App. 167. The district court referred to the stipulation submitted by the Appellants and the County stating that the Board of Supervisors was unable to demonstrate that several of the judicial district consolidation ordinances did not result in a retrogression of Latino voting strength. Although the district court had not accepted the stipulation, it could not "overlook that stipulation in fashioning a temporary solution." Jt. App. 167.

The district court listed three reasons supporting the use of an at-large election system as an interim plan. First, the district court observed that the instant action was not a proceeding under Section 2 of the Voting Rights Act.¹⁴ Jt. App. 167, 172. Second, the Appellants and the County did not suggest any evidence that the consolidation ordinances were adopted pursuant to a discriminatory purpose. Third, the district court believed that *Miller* raised serious doubts that an alternative race-based districting plan could ever withstand constitutional review.¹⁵ Jt. App. 167. A countywide election system, the court reasoned, avoided these problems. Jt. App.

¹⁴ Under Section 2, minority voters can challenge an election practice or structure if such a practice or structure denies the minority community an equal opportunity to participate in the political process and elect a candidate of its choice. 42 U.S.C. § 1973.

¹⁵ The district court noted that race-based election districts raised constitutional concerns especially in the context of municipal court judges who served the entire County. Moreover, there was no claim that the boundaries of Monterey County were configured so as to deprive any racial or ethnic group of their voting power. Jt. App. 171 - 172.

171.¹⁶

In its Order, the district court rejected the contention advanced by the Appellants and the County that implementing countywide elections would be retrogressive when compared to the interim division plan. Jt. App. 171 - 172. The Appellants and the County argued that based upon the regulations governing the administration of Section 5, the appropriate retrogression comparison was to the "last legally enforceable" election plan. 28 C.F.R. § 51.54(b). Jt. App. 171 - 172. However, the district court rejected this interpretation by holding that the division election plan was not the last legally enforceable election plan, since the district court had to suspend applicable state constitutional provisions to permit its implementation and the division plan was used only on an emergency basis. Also, without the benefit of any evidence, the district court held that the at-large election was not retrogressive when compared to the plan in effect prior to the consolidation ordinances, Jt. App. 172, despite the County's stipulation that its ordinances were retrogressive. J.S. App. 98 - 99.

In the November 1, 1995, Order, the district court deferred any hearings in order to permit the County to develop a permanent plan. Jt. App. 173. The district court also joined the State as a party defendant and permitted the State to assert defenses, including defenses based on the alleged inapplicability of Section 5. Finally, the parties were ordered to provide by September 6, 1996, reports to the district court regarding any progress in the adoption of a permanent plan. *Id.*

¹⁶ As further support, the district court noted that the at-large election system was the legislative choice of the citizens of the County and was "more protective of minority voting rights as defined in *Miller*." Jt. App. 172.

After the filing of the November 1, 1995, Order, the Attorney General on November 13, 1995, issued a letter stating that the countywide method of electing judges had not received the required Section 5 approval. J.S. App. 28 - 33.

The district court on November 30, 1995, denied Appellants' motion for reconsideration. In its denial of the motion for reconsideration, the district court stated that the basis for ordering countywide elections was the district court's equitable powers to fashion a temporary plan pending Section 5 approval of a plan which does not violate state law. The district court's Order "was not based on any assumption that countywide elections for municipal court judges had been precleared." Jt. App. 184.

On November 30, 1995, the Appellants filed their Notice of Appeal. J.S. App. 26 - 27. On January 2, 1996, the district court denied Appellants' motion for a stay pending appeal. Jt. App. 185. On February 1, 1996, this Court granted Appellants' application for a stay of the district court's November 1, 1995, Order. On April 1, 1996, this Court noted probable jurisdiction.

SUMMARY OF ARGUMENT

Section 5 covered jurisdictions may not implement voting changes unless preclearance has been obtained. *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). In April 1993, the district court found that Monterey County had failed to obtain the requisite Section 5 approval to implement its at-large election plan. Two years later, the district court ordered implementation of this same unprecleared plan thereby violating this Court's longstanding Section 5 precedent.

In doing so, the district court acted precipitously and in violation of this Court's admonition in *Clark v. Roemer* that

unprecleared voting changes may be implemented only under "extreme circumstances." 500 U.S. at 654. There were no "extreme circumstances" present on November 1, 1995, that might justify the lower court's ordering implementation of an unprecleared at-large system.

The Section 5 precleared interim division plan, then in effect, was constitutionally sound and fully consistent with the standards articulated in *Miller*. Yet even if the district court doubted the continued viability of the interim plan post-*Miller*, more than one year remained prior to the expiration of any judicial terms in January 1997. The district court thus had ample opportunity to conduct an evidentiary hearing, adequately assess the constitutionality of the interim plan, consider alternatives if the interim plan was deemed to be unconstitutional in light of *Miller*, and still provide for judicial elections at the regularly scheduled November 1996 general election with any run-off elections in December.

As a last resort, if the district court considered this time period too short, it should have extended the judicial terms. *Brooks v. State Bd. of Elections*, 790 F.Supp. 1156 (S.D. Ga. 1990). But the one option that it could not lawfully order -- implementation of an unprecleared plan -- is the option that it chose. Its order must be reversed.

ARGUMENT

I. THE DISTRICT COURT ERRED IN ORDERING ELECTIONS TO BE CONDUCTED PURSUANT TO VOTING CHANGES SUBJECT TO, BUT NOT PRECLEARED UNDER, SECTION 5

The district court, by ordering elections to proceed pursuant to voting changes that the court already found to be

unprecleared, disregarded this Court's longstanding precedent prohibiting implementation of unprecleared election changes. As initially held in *South Carolina v. Katzenbach* and repeatedly reaffirmed over the past thirty years,¹⁷ voting changes subject to the Section 5 preclearance provisions are automatically suspended.

As an unanimous Court held in *Clark*:

"Here the District Court did not face the *ex post* question whether to set aside illegal elections; rather it faced the *ex ante* question whether to allow illegal elections to be held at all. On these premises, Sec. 5's prohibition against implementation of unprecleared changes required the District Court to enjoin the election."

Id., 500 U.S. at 654. The district court's order violates these clear commands of Section 5. Accordingly, this Court should reverse and direct the district court, on remand, to enter an injunction¹⁸ restraining any further use of the unprecleared changes unless and until preclearance is obtained from the Attorney General or the District Court for the District of Columbia.

¹⁷ See, e.g., *Allen v. State Board of Elections*, 393 U.S. 544, 555 (1969); *Perkins v. Matthews*, 400 U.S. 379, 397 (1971); *Connor v. Waller*, 421 U.S. 656 (1973); *U.S. v. Board of Supervisors*, 429 U.S. 642, 645 (1977).

¹⁸ In *Allen*, *supra*, 393 U.S. at 555, this Court recognized the right of private parties to secure an injunction to prevent the implementation of voting changes which have not been submitted for Section 5 approval.

There can be no dispute that the countywide method of electing municipal court judges has not received Section 5 preclearance. On April 1, 1993, the district court held that "the Monterey County Ordinances at issue herein, . . . constitute election changes subject to Section 5 preclearance and that, further, the ordinances have not been precleared . . ." Jt. App. 59. Thus, by its own admission, the district court ordered the implementation of a change affecting voting which has not received the requisite approval under Section 5.

Additionally, on November 13, 1995, the Attorney General affirmed that the countywide election system for municipal court judges in the County has never been approved pursuant to Section 5.¹⁹ As noted by the Attorney General:

¹⁹ While appellants disagree with the United States' revised factual contention that preclearance was granted for one of the relevant County ordinances (No. 2930), we fully agree that this ambiguity is immaterial to this Court's ultimate review of the district court's November 1, 1995, Order. Amicus Brief of United States at 15 - 16, n.10. The State's submission of the 1983 statute did not identify the other relevant County ordinances that consolidated the judicial districts nor did the submission reveal that the three districts consolidated by Ordinance No. 2930 were themselves dependent upon antecedent, unprecleared consolidations. "When a jurisdiction adopts legislation that makes clearly defined changes in its election practices, sending that legislation to the Attorney General merely with a general request for preclearance pursuant to Sec. 5 . . . cannot be deemed a submission of changes made by previous legislation which themselves were independently subject to Sec. 5 preclearance." *McCain v. Lybrand*, 465 U.S. 236, 256 (1984). Therefore, even if the changes effected by

"Contrary to representations that apparently were made at ... [the September 28, 1995] status conference, the at-large method of election for the municipal court judges in Monterey County was never submitted for Section 5 review, and it has not been precleared.

... Thus, it is clear from the submission letter that the at-large method of election was never submitted for Section 5 review, and the March 6, 1995, preclearance letter [approving the interim plan for the June 6, 1995, special election] demonstrates that the Attorney General did not review or preclear the at-large method of election."

J.S. App. 29 & 31.

Implementation of the district court's Order will infringe upon the rights of Latino voters to participate in an election system which complies with federal law. Most significantly, the Order will result in the replacement of municipal court judges who were elected pursuant to a temporary division election plan which received Section 5 approval with municipal court judges who will be elected pursuant to an election system which violates federal law.²⁰

Ordinance No. 2930 were precleared, "they may not be implemented unless and until all of the underlying changes are precleared." Amicus Brief of United States at 16, n.10.

²⁰ See *Campos v. City of Houston*, 968 F.2d 446, 452 (5th Cir. 1992), cert. denied, 506 U.S. 1050 (1993) (court abused its discretion in implementing Section 5 unprecleared

Given the absence of any Section 5 preclearance herein, the district court's November 1, 1995, Order implementing an unprecleared method of electing municipal court judges presents a clear violation of the Voting Rights Act and should be reversed.

II. NO "EXTREME CIRCUMSTANCES" EXIST THAT COULD JUSTIFY THE USE OF UNPRECLEARED ELECTION CHANGES

In *Clark*, a case substantially similar to the action *sub judice*, this Court reversed a district court's refusal to enjoin unprecleared elections. The district court had cited a number of reasons for not enjoining the election, none of which this Court found persuasive. The lower court pointed to: (1) the short time between the most recent request for an injunction and the election; (2) the fact that qualifying and absentee voting had begun; and (3) the time and expense of the candidates. *Clark, supra*, 500 U.S. at 653 - 54. This Court rejected these factors as justifying the refusal to enjoin an unprecleared election. Instead, referring to a procedural history mirroring the instant action, this Court found that the parties, the district court, and the candidates had been on notice of the alleged Section 5 violations since appellants filed their amended complaint three years earlier. *Id.*, 500 U.S. at 655.

In *Clark*, this Court did set forth an "extreme circumstance" in which a district court's refusal to enjoin an unprecleared election might be justified: "An extreme circumstance might be present if a seat's unprecleared status is not drawn to the attention of the State until the eve of the election and there are equitable principles that justify allowing the election to proceed." *Id.*, 500 U.S. at 654-655. Here, all

election plan when Section 5 precleared plan was available).

parties and the district court were on notice of Section 5 violations for a period of four years prior to the court ordering the unprecleared election. No "extreme circumstance" existed that could justify departure from thirty years of Section 5 precedent in this Court.

The district court actually did not face any constraints that could be characterized as "extreme." This Court's decision in *Miller* was issued in late June 1995. The next regularly scheduled election in California was set for March 26, 1996, almost nine months later. This period should have been sufficient for the court to conduct an evidentiary hearing at which its concerns regarding *Miller* could have been addressed and resolved. But even if this time period were not sufficient, the district court could have scheduled the judicial elections to coincide with the State's November 1996 general election with any run-off elections in December. Under either scenario, elections would be held prior to the expiration of judicial terms in January 1997.

A. None of the Factors Cited by the District Court Justifies the Use of Unprecleared Election Changes

The district court listed several reasons to support its order to implement an election system which had not secured Section 5 preclearance. First, the district court noted that there was no Section 2 claim in this action. *Jt. App.* 167. The absence of a Section 2 claim was cited by the district court in two instances. The first instance related to the "legitimate concerns" advanced by the Appellants in arguing against the implementation of countywide elections. The district court appears to suggest that the absence of a Section 2 finding of liability against the use of an at-large election system provides significant support for its ordering the implementation of

countywide elections as part of an interim election plan.

The district court's reliance on the absence of a Section 2 claim is misplaced. Under this Court's precedent, Appellants could not initiate any Section 2 action against the at-large election system until Section 5 approval had been obtained. According to *Connor v. Waller, supra*, 421 U.S. at 656, the at-large election system, absent Section 5 preclearance, is unlawful and not in effect. In *Connor v. Waller*, the district court was prohibited from ruling on the constitutional validity of reapportionment statutes until Section 5 preclearance had been obtained. *Id.* In view of this precedent, Appellants could not initiate a Section 2 challenge to an election system which was not in effect.²¹ Thus, the absence of a Section 2 claim in this action could not justify a departure from this Court's consistent line of precedent in order to implement an election change which has not received Section 5 preclearance.

The second reason advanced by the district court to support the use of a countywide election system related to the absence of any evidence that the consolidation ordinances were adopted pursuant to a discriminatory purpose. *Jt. App.* 167. Such a focus is in error. The legal issue of whether the consolidation ordinances were adopted pursuant to a discriminatory purpose can only be resolved by the Attorney General or the District Court for the District of Columbia along with the question of whether the Section 5 covered jurisdiction

²¹ The second instance of the district court's reliance on the absence of a Section 2 claim relates to its decision to "defer holding any hearing on a permanent plan." *Jt. App.* 172. Since a Section 2 claim could not be filed by the Appellants, its absence should not have a bearing on whether the district court will conduct an evidentiary hearing on a future permanent election plan.

can demonstrate the absence of a discriminatory effect on minority voting strength. 42 U.S.C. § 1973c. In the instant action, the applicable ordinances have not secured the requisite Section 5 preclearance. Absent such preclearance, the at-large election system cannot be implemented. Thus, the absence of any evidence of discriminatory purpose in the adoption of the consolidation ordinances, where the Section 5 covered jurisdiction has failed to secure preclearance of the ordinances, cannot justify the use of an at-large election change ultimately resulting from the implementation of these unprecleared ordinances.

B. *Miller* Does Not Require the Use of Unprecleared Election Changes

The district court also relied upon *Miller* as support for the implementation of countywide municipal court elections. As interpreted by the district court, *Miller* casts doubt on the constitutionality of race-based redistricting plans and accordingly, the at-large election system presents the best election structure to protect minority voting rights in the County. *Jt. App.* 167 - 172. However, a review of *Miller* demonstrates that the district court misapplied this Court's holding and its error cannot serve as a basis for the implementation of an election change which has not secured Section 5 preclearance.

Miller involved a constitutional challenge to the congressional redistricting plan for the State of Georgia. This Court held that a race-based redistricting plan, where race was the predominant motivating factor *and the jurisdiction subordinated traditional redistricting principles*, is unconstitutional unless the "districting legislation is narrowly tailored to achieve a compelling interest." *Miller, supra*, 115 S.Ct. at 2490. To invoke strict scrutiny, it is not sufficient

merely to show that racial factors were relied upon. Instead, a party must demonstrate that a jurisdiction relied on race "in substantial disregard of customary and traditional districting practices." *Miller, supra*, 115 S.Ct. at 2497 (J. O'Connor, concurring).

But even application of strict scrutiny is not fatal to a jurisdiction's districting plan. While noting that strict scrutiny is "our most rigorous and exacting standard of constitutional review," *Miller* made clear that a court's inquiry does not terminate upon invocation of the standard. *Id.*, at 2490. Underscoring that strict scrutiny simply shifts the burden of producing evidence, this Court held that a jurisdiction could satisfy its burden by demonstrating a compelling interest. *Id.* Here, for example, a compelling interest might be avoiding retrogression by favoring a precleared districting plan over an unprecleared, admittedly retrogressive, at-large plan at least until a permanent plan can be developed.

Despite *Miller's* carefully conceived scheme for conducting a 14th Amendment inquiry, the lower court inexplicably denied the parties any opportunity to present evidence that might bear on this constitutional determination.²² Instead, the district court appears to have relied on a single, unsworn statement to conclusively decide that the June 1995 interim division plan was unconstitutional.

²² For example, at an evidentiary hearing, the Appellants would have presented evidence that the June 1995 interim division plan incorporated traditional redistricting principles such as geographical compactness. When the interim division plan is compared to the 1968 judicial district plan, the divisions are equally as compact as the judicial districts. Intervenor Sillman's App. 49a, 51a.

The County Counsel's statement at a status conference that the June 1995 plan was race-based cannot substitute for the required evidentiary hearing. The attorney's statement was not subject to cross-examination nor was there any opportunity to offer rebuttal evidence. Yet even if the district court properly relied on the County Counsel's statement that the June 1995 election plan was race-based, the plaintiffs should have been given an opportunity to demonstrate that the plan satisfied the strict scrutiny standard. Indeed, in a case decided the same day as *Miller*, this Court approved of a redistricting plan in which race was a significant factor. *Dewitt v. Wilson*, 856 F.Supp. 1409 (E.D.Cal. 1994), *aff'd in relevant part and dismissed in part*, 115 S.Ct. 2637 (1995).

The California redistricting plan examined in *Dewitt* was drawn by a panel of Special Masters appointed by the California Supreme Court. The Court specifically approved of the Special Masters' approach in "determining the compactness of a particular minority group for purposes of assuring its protection under the Voting Rights Act." *Id.*, 856 F.Supp. at 1411, *citing Wilson v. Eu*, 4 Cal. Rptr. 2d 379, 383-384 (1992). This approach included an attempt by the Special Masters to "accommodate the interests of every 'functionally, geographically compact' minority group of sufficient voting strength to constitute a majority in a single-member district."²³

²³ Relevant to maintaining "geographically compact" minority groups, the California Supreme Court also approved of the Special Masters' approach in splitting municipalities. In the analogous context of congressional redistricting, Cal. Const. Art. XXI, the California Supreme Court addressed the possible conflict between the Voting Rights Act and the state constitution "where a geographically compact minority group is located partly within and partly without a city ... In areas where such a situation exists, and where a minority influence district could be

Id. For example, in Los Angeles, the Masters "started both by tracing a line around census tracts with majority or near majority Latino population and by mapping out what areas were covered by Latino districts created by the various plans submitted to us." *Wilson, supra*, 4 Cal. Rptr. 2d at 418.

The *Dewitt* court found that the Masters "properly looked at race, not as the sole criteria in drawing lines but as one of the many factors to be considered." *Dewitt, supra*, 856 F.Supp. at 1413. The court held that since the plan did not amount to racial gerrymandering, strict scrutiny was not triggered. *Id.* 856 F.Supp. at 1415. Even if strict scrutiny were applied, the district court held, the plan had "been narrowly tailored to meet a compelling state interest." *Id.*

This Court summarily affirmed with respect to questions 1 through 4 of the Jurisdictional Statement, which can be summarized as follows: (1) whether the California plan, created by Special Masters who stated that one of their primary objectives was to create special racial districts, constituted a racial gerrymander; (2) whether race-based redistricting, absent compelling justification, violates the 14th and 15th Amendments; (3) whether "packing" white voters in high turnout districts impermissibly dilutes their voting strength; and (4) whether plans that deviate in "actual voting strength" violate the principle of "one-person, one-vote." *Dewitt*, 115 S.Ct. 2637 (Jurisdictional Statement).

Therefore, *Dewitt*, like *Miller*, stands for the proposition that race-conscious redistricting will not even trigger strict scrutiny when traditional redistricting principles are applied.

created, we have given precedence to keeping geographically compact minority groups together rather than maintain city boundaries." *Wilson, supra*, 4 Cal.Rptr.2d at 409.

But, in summarily dismissing the June 1995 plan as unconstitutional, the district court here never conducted the requested evidentiary hearing, never afforded plaintiffs an opportunity to demonstrate a compelling interest for the June 1995 plan, and instead ordered implementation of an unprecleared, at-large plan that it knew might be retrogressive. In its December 20, 1994, Order, the district court stated that it was "reluctant to consider a single district, countywide election plan as a temporary remedy in light of the supported stipulation [between the County and the Appellants] that such a plan would be retrogressive in terms of Latino voting strength."²⁴ *Jt. App.* 129 - 130, n. 4. The County's stipulation, and the district court's reliance on it, together with the fact that the at-large system had never been submitted for Section 5 review, should have caused the district court to consider alternative remedies²⁵ before ordering implementation of an unprecleared plan.

Finally, the district court misapplied this Court's holdings in concluding that an at-large election system was superior in protecting the rights of minority voters as defined in *Miller*. As noted above, the district court did not complete the

²⁴ In its November 1, 1995, Order, the lower court backed away from this determination in finding that, based upon "the reasoning of *Miller*, the court cannot say that a countywide election plan is necessarily unlawfully retrogressive." *Jt. App.* 172. The district court's ambivalence strongly suggests that the issue of retrogression in a court-ordered at-large system is, at the very least, a close question that should not have been decided adversely to plaintiffs without the benefit of an evidentiary hearing.

²⁵ For example, the district court could have developed an alternative districting plan which, in the district court's view, did not trigger strict scrutiny.

constitutional analysis required by *Miller* to determine if, in fact, the division election plan was unconstitutional. Nevertheless, the district court approved the use of an at-large election system by suggesting that such an election plan was not unconstitutional and was more protective of minority voting rights than the previous division election plan.

But the district court could not engage in any constitutional analysis or otherwise review a method of election which has not received the requisite Section 5 preclearance. *U.S. v. Board of Supervisors, supra*, 429 U.S. at 646 - 647 ("In both instances the court below erred in deciding the questions of constitutional law; it should have determined only whether Warren County could be enjoined from holding elections under a new redistricting plan because such plan had not been cleared under § 5." (footnote omitted)). See also *Connor v. Waller, supra*, 421 U.S. at 656 (election plans "are not now and will not be effective as laws until and unless cleared pursuant to § 5.").

Moreover, the preference for an at-large election system is inconsistent with the concern expressed by this Court in *Allen* that such election systems have the potential to discriminate against minority voting strength:

"Voters who are members of a racial minority might well be in the majority in one district, but in a decided minority in the county as a whole. This type of change could therefore nullify their ability to elect the candidate of their choice just as would prohibiting some of them from voting."

Allen, supra, 393 U.S. at 569. In this case, such a concern is not completely unwarranted in view of the uncontested stipulations submitted by the Appellants and the County suggesting that an at-large election system has the potential for

violating Section 2 of the Act. Brief for Appellants at 43.

Thus, given the potential discriminatory effect of an at-large election system and the absence of any constitutional finding in support of the at-large election system or a constitutional finding that the division election plan was unconstitutional, there was an insufficient basis for the district court to conclude that the at-large election system was superior to the division election plan. Nor can this Court's holding in *Miller* be interpreted to provide any support for the notion that at-large systems are more protective of minority voting interests than districting plans.

C. Given the Absence of "Extreme Circumstances," the District Court Should Have Extended the Terms of Judges Elected in June 1995 Until the County and State Presented a Plan Which Received Section 5 Preclearance

If the district court, for whatever reason, felt that it could not assess the constitutionality of an election plan for either the March or November 1996 elections, then it should have extended the terms of those judges elected in June 1995. The terms could be extended until the County and the State presented a permanent plan which received Section 5 approval.

When faced with the prospect of elections being conducted pursuant to unprecleared plans, other courts have abided by this Court's admonition in *Clark*: "In fashioning its decree granting relief, the District Court should adopt a remedy that in all the circumstances of the case implements the mandate of Sec. 5 in the most equitable and practicable manner and with least offense to its provisions." *Clark*, 500 U.S. at 660. In *Brooks*, for example, the district court initially noted that

preclearance litigation in the District of Columbia could be prolonged and extending judicial terms "may delay the expeditious resolution of this controversy." *Brooks, supra*, 790 F.Supp. at 1159. Nonetheless, mindful that "granting the requested relief will continue to 'assure that the defendants will be able to seek judicial review of the statutes without the risk of serious disruption of Georgia's judiciary,'" *Id.* (quoting *Brooks v. State Bd. of Elections*, 775 F.Supp. 1490, 1491 (S.D.Ga. 1989), *aff'd mem.*, 498 U.S. 916 (1991)), the district court extended the judicial terms "until the declaratory action in the District of Columbia is concluded, or until the Georgia legislature enacts a scheme for judicial elections which is precleared, and an election is conducted pursuant to that scheme." *Id.* at 1160.

The judges elected in June 1995 are serving abbreviated terms instead of the usual six-year terms. *Jt. App.* 137; Cal. Gov. Code § 71145. Thus, extension of these shortened terms not only would allow the district court additional time to consider legally sustainable options but clearly would avoid any disruption of the County's judiciary.²⁶

²⁶ Providing an extension of judicial terms at this time would not have been any more intrusive than the previous extension of judicial terms for those judges who were elected pursuant to the unprecleared consolidation ordinances pending the adoption and Section 5 preclearance of a permanent election plan. *Jt. App.* 92 (district court enjoined the County from conducting any elections for municipal court judges until Section 5 preclearance was secured; injunction resulted in the extension of judicial terms until the special June 6, 1995, judicial election).

III. THE DISTRICT COURT ERRED BY FAILING TO FOLLOW THE STANDARDS ESTABLISHED FOR COURT-ORDERED PLANS

Since the County and the State failed to present an election plan which secured Section 5 preclearance, the district court was compelled to issue a court-ordered remedy. As noted by this Court in *Wise v. Lipscomb*, 437 U.S. 535 (1978):

"Legislative bodies should not leave their reapportionment tasks to the federal courts; but when those with legislative responsibilities do not respond, or the imminence of a state election makes it impractical for them to do so, it becomes the 'unwelcome obligation,' " *Connor v. Finch, supra*, 431 U.S. at 415, 97 S.Ct. at 1833, of the federal court to devise and impose a reapportionment plan pending later legislative action."

Wise, supra, 437 U.S. at 540.

In fashioning court-ordered plans, this Court has stated in numerous decisions that "the court's task is inevitably an exposed and sensitive one that must be accomplished circumspectly, and in a manner 'free from any taint of arbitrariness or discrimination.'" *Connor v. Finch*, 431 U.S. 407, 415 (1977). Accordingly, this Court has required district courts to adhere to certain requirements in fashioning court-ordered plans. The district court did not follow those requirements.

A. The District Court Failed to Incorporate Section 5 Standards

First, the district court's remedy failed to incorporate Section 5 standards. As noted in the 1975 Senate Report accompanying the extension of the 1965 Voting Rights Act: "Furthermore, in fashioning the [court-ordered] plan, the court should follow the appropriate Section 5 standards, including the body of administrative and judicial precedents developed in Section 5 cases." Senate Report No. 94-295, 94th Cong., 1st Sess., at 19 (July 22, 1975).

A review of the legislative history accompanying the 1975 amendments to the Voting Rights Act reveals that there was a concern with federal district courts circumventing Section 5 by incorporating voting changes which had not received Section 5 approval into court-ordered remedies.

"In other cases, the Section 5 submission requirement has been circumvented by lawsuits filed in Mississippi District Courts. For example, the three-judge District Court in the state legislative reapportionment case ruled recently that the 1973 legislative redistricting did not have to be submitted because that court had continuing jurisdiction to pass on any new plans enacted by the Legislature. Rulings like this create the real danger that discriminatory redistricting can be accomplished by sweetheart suits in which the interests of Black voters are not represented, and such plans can be put into effect without Section 5 scrutiny by the Attorney General."

"Extension of the Voting Rights Act of 1965," Hearings Before

the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, 94th Cong., 1st Sess., at 146 (1975) (Testimony of Frank R. Parker, Esq., then Assistant Chief Counsel, Mississippi Office, Lawyers' Committee for Civil Rights Under Law). This testimony formed the basis for the Senate Report's directive that federal district courts in Section 5 covered jurisdictions should incorporate Section 5 substantive standards in their court-ordered remedies.

This Court in *McDaniel v. Sanchez*, 452 U.S. 130, 148 (1981), cited with approval the Senate Report language and stated that the Committee Report was "crystal clear on this point" by noting that "[t]he Committee unambiguously stated that the statutory protections are to be available even when the redistricting is ordered by a federal court to remedy a constitutional violation that has been established in pending federal litigation." See, *Upham v. Seamon*, 456 U.S. 37 (1982). See also, *Edge v. Sumter County School District*, 775 F. 2d 1509 (11th Cir. 1985).

As a preliminary matter, based upon *McDaniel*, the district court should not have implemented an unprecleared voting change as part of a court-ordered remedy. The district court simply could not bypass this prohibition by stating that the implementation of such a voting change was pursuant to its equitable powers to develop an appropriate temporary remedy pending the Section 5 approval of a permanent plan. *Jt. App.* 184. Under this standard, covered jurisdictions could avoid the requirements of Section 5 by simply not seeking preclearance, knowing that any subsequent litigation could result in a court-ordered remedy incorporating the unprecleared voting change. Such a standard would clearly invite circumvention of the

Section 5 preclearance requirements.²⁷

Moreover, at a minimum, to assure compliance with Section 5 substantive standards, a court-ordered plan must avoid retrogression.²⁸ In accordance with *McDaniel*, a district court cannot determine whether an election change reflecting the policy choices of a covered jurisdiction is retrogressive. Such a review is reserved exclusively for either the Attorney General or the District Court for the District of Columbia. 42 U.S.C. § 1973c. However, in formulating a court-ordered plan, the district court must ascertain that *its* plan does not result in a retrogression of minority voting strength.

In the present case, the previous temporary election plan

²⁷ A similar concern was expressed by the United States in its *Amicus Curiae* Brief in *McDaniel*. The United States argued that an exemption from Section 5 approval of those election plans submitted by covered jurisdictions to remedy a constitutional violation would result in a circumvention of the Section 5 preclearance provisions by way of a federal court order. Covered jurisdictions "operating under unconstitutional apportionment schemes would have a disincentive to redistricting themselves, since they could avoid complying with Section 5 simply by awaiting suit and proposing a new reapportionment plan to the district court." *Amicus Curiae* Brief at 16.

²⁸ In fact, the district court in its December 20, 1994, Order referred to the retrogression standard as a reason for not implementing an at-large election as part of a temporary election plan: "[T]his court is reluctant to consider a single district, countywide election plan as a temporary remedy in light of the supported stipulation that such a plan would be retrogressive in terms of Latino voting strength." Jt. App. 130, n. 4.

used in the June 6, 1995, special judicial election, received Section 5 preclearance on March 6, 1995. Consequently, the appropriate benchmark for evaluating any subsequent court-ordered plan is the temporary district election plan previously approved pursuant to Section 5.²⁹ When measured against the previous plan, the November 1, 1995, court-ordered at-large election plan is retrogressive. The previous Section 5 approved plan contained two election districts each consisting of a 52% Latino eligible voter population. J.S. App. 89. The November 1, 1995, court-ordered election plan consists of a single countywide election district where the Latino eligible voter population is 17% of the eligible voter population for the County. J.S. App. 91. A reduction in Latino eligible voter population from 52% to 17% constitutes retrogression.

The court-ordered plan is also retrogressive when measured against the election plan in place on November 1, 1968, the date of Section 5 coverage for the County. Under the 1968 judicial district configuration, there were three judicial districts each having at least a majority of Latino eligible voters.

²⁹ The federal regulations governing the administration of Section 5 state that the appropriate comparison is the "last legally enforceable practice or procedure used by the jurisdiction." 28 C.F.R. § 51.54(b). Clearly, the "last legally enforceable" plan was the election plan used in the June 6, 1995, special judicial election, which received Section 5 preclearance. See *State of Texas v. United States*, 785 F.Supp. 201, 204 - 205 (D.D.C. 1982) (court-ordered temporary plan is appropriate comparison); *State of Mississippi v. Smith*, 541 F.Supp. 1329, 1333 (D.D.C. 1982) (new plan must not result in retrogression when compared to court-ordered plan), *appeal dismissed*, 461 U.S. 912 (1983); *State of Mississippi v. United States*, 490 F.Supp. 569, 582 (D.D.C. 1979) (court-ordered plan is the new benchmark for comparison), *sum. aff'd*, 444 U.S. 1050 (1980).

Appellee State of California Motion to Dismiss or Affirm, Appendix 14a (Gonzales - 54%; Greenfield - 51%; Soledad (excluding prison population) - 62%).

Finally, if there is no plan available for purposes of conducting a retrogression analysis, the appropriate measuring benchmark then becomes a plan which fairly reflects the voting strength of the minority voting community. *Wilkes County, Georgia v. United States*, 450 F.Supp. 1171, 1176 (D.D.C. 1978), *aff'd mem.*, 439 U.S. 999 (1978). A fairly drawn plan would have to consist of judicial districts since in 1968 judicial election districts in the County were reflective of the State's policy preferences, which are not the subject of any judicial challenge. In formulating a court-ordered plan, a federal district court will defer to such policy preferences. *Upham, supra*, 456 U.S. at 41 - 42. The fairly drawn judicial district plan would contain at least two predominantly Latino judicial districts given the Latino population concentrations in Monterey County. J.S. App. 94 - 95 (Stipulation No. 5 - Hispanic Origin population concentrations for selected cities and areas ranging from 50.6% for the City of Salinas to 89.5% for the City of Soledad); J.S. App. 95 (Stipulation No. 6 - Hispanic Origin population is geographically concentrated). When compared to such a fairly drawn election plan, the at-large election system is also retrogressive.

B. The District Court Failed Even to Examine Whether Its Court-Ordered Remedy Might Violate Section 2

A court-ordered plan must itself not result in a violation of Section 2 of the Voting Rights Act.³⁰ See, e.g., *Edge, supra*,

³⁰ Even though Appellants could not challenge the at-large plan pursuant to Section 2 until Section 5 approval was

775 F.2d at 1510 ("We agree with both the appellants and the submission of the United States as *amicus curiae* that the district court could not validly adopt a reapportionment plan without determining whether the plan complied with Section 2 of the Voting Rights Act"); *Jordan v. Winter*, 604 F.Supp. 807 (N.D.Miss. 1984) (district court evaluated court-ordered plan pursuant to Section 2 analysis), *aff'd sub nom.*, *Mississippi Republican Executive Committee v. Brooks*, 469 U.S. 1002 (1984).

In the instant case, the district court should have conducted a hearing to determine whether its proposed court-ordered countywide election system violated Section 2. *Edge, supra*, 775 F.2d at 1511 ("[A] hearing is necessary to determine whether the court's plan complies with Section 2."). Such a hearing would have given the parties and the district court an opportunity to review and evaluate the following stipulations filed by the Appellants and the County which were relevant to a Section 2 determination: 1) the Latino community was sufficiently geographically compact to create a district which contained at least a 50% Latino eligible voter population, J.S. App. 94 - 95 (Stipulation Nos. 5, 6, 7); 2) the Latino communities in the County were politically cohesive, J.S. App. 95 - 96 (Stipulation No. 8 a); 3) there was Anglo bloc voting which defeated the voting preferences of the Latino community, J.S. App. 96 (Stipulation No. 8 b); 4) there were instances of discrimination against Latinos affecting their right to register, vote, and participate in the political process, J.S. App. 97 - 99 (Stipulation No. 9); 5) the County implemented a numbered place system for electing municipal court judges which impaired the opportunity of Latinos to elect candidates of their choice, J.S. App. 99 (Stipulation No. 10); 6) the Latino community is

secured, a district court has an independent obligation to assure that its court-ordered remedy does not violate Section 2.

affected by certain socioeconomic factors in education, language, employment, health, and housing, which may hinder their ability to effective participation in the political process, J.S. App. 99 - 103 (Stipulation No. 11); and 7) prior to the filing of this action, not a single Latino had ever been appointed or elected to the County's municipal court, J.S. App.103 (Stipulation No. 12).

These stipulations, which have not been contested by any party, clearly suggest that a countywide election system would operate to deny Latinos an equal opportunity to participate in the political process and elect candidates of their choice. *Thornburg v. Gingles*, 478 U.S. 30 (1986). This evidence is particularly compelling since there is no countervailing state policy justifying the use of a countywide election system in the face of a potential Section 2 violation. Jt. App. 133 - 135 (district court found "no strong public policy" supporting strict linkage between a municipal court judge's electoral and jurisdictional bases). Given these stipulations, the district court should have conducted an evidentiary hearing to determine whether its proposed remedy conformed to Section 2.

C. The District Court Failed to Adhere to This Court's "Strong Preference" for Single-Member Districts

This Court has "repeatedly reaffirmed" that in fashioning remedies for voting rights violations, single-member districts should be preferred over multimember districts: "Among other requirements, a court-drawn plan should prefer single-member districts over multimember, absent persuasive justification to the contrary." *Wise, supra*, 437 U.S. at 540, citing, *inter alia*, *Connor v. Johnson*, 402 U.S. 690, 692 (1971). Pursuant to this principle, single-member districts are to be preferred unless the district court can articulate "a singular combination of unique

factors' that justifies a different result."³¹ *Connor v. Finch, supra*, 431 U.S. at 415 (1977), quoting *Mahan v. Howell*, 410 U.S. 315, 333 (1973).

Even an historic policy of not fragmenting counties in the formulation of redistricting plans should not deter a district court's preference for single member districts. *See Connor v. Finch, supra*, 431 U.S. at 415 ("The defendants' unallayed reliance on Mississippi's historic policy against fragmenting counties is insufficient to overcome the strong preference for single-member districting . . ."). *See also Connor v. Johnson, supra*, 402 U.S. at 692 (single-member plan must be implemented "absent insurmountable difficulties"); *East Carroll Parish School Bd. v. Marshall*, 424 U.S. 636, 639 (1976) (reversing multimember plan adopted by district court, noting that "when United States district courts are put to the task of fashioning reapportionment plans to supplant concededly invalid state legislation, single-member districts are to be preferred absent unusual circumstances").

The soundness of this Court's preference for single-member districts should not have been disregarded by the district court. No "persuasive justification," "unusual circumstances," or "insurmountable difficulties" in creating a single-member plan have been shown here.

CONCLUSION

The district court's November 1, 1995, Order implementing a voting change which has not secured Section 5

³¹ "[T]he general preference for single-member districts in court-ordered plans" applies even when "no allegation of minority group discrimination is raised." *Chapman v. Meier*, 420 U.S. 1, 20 (1975).

preclearance as part of an interim court-ordered election plan should be reversed. The district court cannot provide a temporary remedy to cure a Section 5 violation by implementing a method of election that also violates the substantive standards of Section 5 of the Voting Rights Act.

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Supreme Court U.S.

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In The
Supreme Court of the United States

October Term, 1996

**VICKY M. LOPEZ, CRESCENCIO PADILLA,
WILLIAM A. MELENDEZ, and DAVID SERENA,**

Appellants,

v.

**MONTEREY COUNTY, CALIFORNIA,
STATE OF CALIFORNIA, et al.,**

Appellees,

and

STEPHEN A. SILLMAN,

Intervenor-Appellee.

**On Appeal From The United States District Court
For The Northern District Of California**

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QUESTIONS PRESENTED

1. WHETHER INJUNCTIVE RELIEF IS REQUIRED IN A SECTION 5 ACTION ABSENT ANY FINDINGS OF RETROGRESSION OR DISCRIMINATION AND BEFORE THE COURT HAS ADDRESSED THE POSSIBLE MOOTNESS OF PRECLEARANCE VIOLATIONS THAT OCCURRED 8-20 YEARS BEFORE.
2. WHETHER A RACE-BASED DISCRIMINATORY DISTRICTING PLAN MAY BE ORDERED OR PERPETUATED AS A "REMEDY" IN A SECTION 5 ACTION WHEN NO HARM HAS BEEN IDENTIFIED AND WHEN THE PLAN IS UNRELATED TO STATUS QUO CONDITIONS.
3. WHETHER, IN A SECTION 5 ACTION AGAINST A COUNTY, THE DISTRICT COURT IS PRECLUDED FROM EXERCISING ITS EQUITABLE REMEDIAL DISCRETION TO ORDER A RACE-NEUTRAL ELECTION PLAN THAT IS CONSISTENT WITH STATE LAWS, STATE PRACTICE, AND THE FOURTEENTH AMENDMENT, MERELY BECAUSE THE COURT'S PLAN CORRESPONDS TO THE CHALLENGED ELECTORAL SYSTEM FORMERLY ADMINISTERED BY THE COUNTY.
4. WHETHER THE TENTH AMENDMENT PERMITS IMPOSITION OF SECTION 5 PRECLEARANCE REQUIREMENTS BASED SOLELY ON LOW VOTER TURNOUT, WHERE NO HISTORY OF DISCRIMINATION IS SHOWN AND WHERE VOTER TURNOUT MAY BE ATTRIBUTABLE TO RACE-NEUTRAL FACTORS.

QUESTIONS PRESENTED – Continued

5. WHETHER THE MERE MERGING AND/OR REDRAWING OF NON-EQUIPOPOULOUS JUDICIAL DISTRICTS, TAKEN ALONE, CONSTITUTES A VOTING STANDARD, PRACTICE, OR PROCEDURE SUBJECT TO SECTION 5 PRECLEARANCE.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
RELEVANT BACKGROUND FACTS.....	1
PROCEDURAL HISTORY OF THE CASE.....	9
SUMMARY OF ARGUMENT.....	17
ARGUMENT	19
I. THE DISTRICT COURT DID NOT REFUSE TO INTERVENE.....	19
II. THE COURT HAD NO DUTY TO "REMEDY" DISCRIMINATION OR RETROGRESSION BECAUSE NONE WAS ESTABLISHED; NEITHER HAS A MATERIAL SECTION 5 VIOLATION YET BEEN FOUND	20
A. No Discrimination Has Been Alleged or Proven	21
B. No Retrogression Has Been Established ...	22
1. Appellants' Stipulation Does Not Establish Retrogression	22
2. Appellants' Deceptive "Apples-to-Oranges" Comparisons Show Nothing...	26
C. The County's Section 5 Violations Have Not Yet Been Finally Determined to Be Material to Current Countywide Municipal Court Elections	28
1. Unresolved Mootness Issue.....	28
2. Unresolved Laches Issue	30

TABLE OF CONTENTS - Continued

Page

3. Unresolved Tenth Amendment Issue: Application of Section 5 to Monterey County in the Present Circumstances is an Unwarranted Usurpation of Powers Reserved to the State	31
4. Unresolved Question Whether Court Consolidation Altered a Voting "Standard, Practice, or Procedure" Subject to Section 5 Preclearance.....	35
III. THE DISCRIMINATORY, RACE-BASED "REMEDY" ADVOCATED BY APPELLANTS IS PLAINLY UNCONSTITUTIONAL	36
A. Defendant County Admitted That Race Was The Exclusive or Predominant Consideration in Fashioning the "Election Divisions" Employed by the Court.....	37
B. Appellants Entirely Ignore the 1994 Plan's Grossly Prejudicial Effects, Which Provide Further Evidence of Discrimination and Subordination.....	41
C. The Race-Based Plan Patently Disregards Normal Principles Applicable to California Municipal Courts	43
D. The Plan Serves No Compelling Purpose and is Not "Narrowly Tailored"	44
E. The Unconstitutional and Unenforceable December 1994 Plan Cannot Be A Voting Rights "Benchmark"	45
IV. THE EXTREME CIRCUMSTANCES HERE WOULD JUSTIFY A THREE-JUDGE COURT'S REFUSAL TO ACT IN ANY EVENT	47

TABLE OF CONTENTS - Continued

Page

V. IN WEIGHING SECTION 5 REMEDIES, COURTS MUST DISTINGUISH BETWEEN LEGISLATIVE AND JUDICIAL OFFICES	49
CONCLUSION	50

TABLE OF AUTHORITIES

Page

CASES

<i>Apache County v. United States</i> , 256 F.Supp. 903 (D.C.D.C. 1966).....	33
<i>Beer v. United States</i> , 425 U.S. 130 (1976)	32, 43
<i>Bossier Parish School Bd. v. Reno</i> , 907 F.Supp. 434 (D.D.C. 1995).....	11, 21, 47
<i>Briscoe v. Bell</i> , 432 U.S. 404, 97 S.Ct. 2428 (1977).....	33
<i>Brooks v. State Bd. of Education</i> , 848 F.Supp. 1548 (S.D. Ga. 1994)	46
<i>Bush v. Vera</i> , ___ U.S. ___, 64 USLW 4452 (June 11, 1996).....	<i>passim</i>
<i>Carrington v. Rash</i> , 380 U.S. 89, 85 S.Ct. 775 (1965) ...	1, 2
<i>Castro v. State of California</i> , 2 Cal.3d 223 (1970).....	5
<i>Chisom v. Roemer</i> , 501 U.S. 380, 111 S.Ct. 2354 (1991).....	28, 31, 36
<i>City of Rome v. United States</i> , 446 U.S. 156 (1980)	33
<i>Clark v. Roemer</i> , 500 U.S. 646, 111 S.Ct. 2096 (1991)	47
<i>County of Monterey v. United States of America</i> , No. 93-1639 (D.D.C., filed Aug. 10, 1993).....	10, 23
<i>DeWitt v. Wilson</i> , 856 F.Supp. 1409 (E.D.Cal. 1994), <i>aff'd in relevant part and dismissed in part</i> , 115 S.Ct. 2637 (1995).....	38
<i>Gregory v. Ashcroft</i> , 501 U.S. 452 (1991).....	34
<i>Holder v. Hall</i> , 515 U.S. ___, 114 S.Ct. 2581 (1994)	21, 22, 50

TABLE OF AUTHORITIES - Continued

Page

<i>Houston Lawyers Ass'n v. Texas</i> , 501 U.S. 419, 111 S.Ct. 2376 (1991).....	31
<i>Johnson v. DeGrandy</i> , ___ U.S. ___, 114 S.Ct. 2647 (1994)	46
<i>Koski v. James</i> , 47 Cal.App.3d 349 (1975).....	9
<i>League of United Latin American Citizens v. Clements</i> , 999 F.2d 831, (5th Cir. 1993), cert. denied, 114 S.Ct. 878 (1993)	48, 49
<i>Lockhart v. United States</i> , 460 U.S. 125, 103 S.Ct. 998 (1983)	22
<i>Lopez v. Hale County, Texas</i> , 797 F.Supp. 547, (N.D.Tex. 1992), <i>aff'd</i> , 113 S.Ct. 954 (1993).....	47
<i>Lopez v. Monterey</i> , 871 F.Supp. 1254 (1994).....	12
<i>Louisiana v. United States</i> , 380 U.S. 145 (1965).....	20
<i>McDaniel v. Sanchez</i> , 452 U.S. 130 (1981).....	20, 46
<i>Miller v. Johnson</i> , 515 U.S. ___, 115 S.Ct. 2475 (1995) <i>passim</i>	
<i>Missouri v. Jenkins</i> , 515 U.S. ___, 115 S.Ct. 2038 (1995)	24
<i>New York v. United States</i> , 505 U.S. 144 (1992)	34
<i>Nipper v. Smith</i> , 39 F.3d 1494 (11th Cir. 1994) cert. denied, ___ U.S. ___, 115 S.Ct. 1795 (1995).....	15, 23, 50
<i>Oregon v. Mitchell</i> , 400 U.S. 112 (1970).....	5
<i>Otsuka v. Hite</i> , 64 Cal.2d 596, 414 P.2d 412 (1966)	1
<i>Perkins v. Matthews</i> , 400 U.S. 379, 91 S.Ct. 431 (1971)	22, 25
<i>Ramirez v. Brown</i> , 9 Cal.3d 199, 507 P.2d 1345 (1973)	1

TABLE OF AUTHORITIES - Continued

Page

<i>Seminole Tribe v. Florida</i> , ___ U.S. ___, 116 S.Ct. 1114 (1996)	34
<i>Shaw v. Reno</i> , 509 U.S. 430 (slip op., at 23)	24
<i>Shaw v. Hunt</i> , ___ U.S. ___, 64 USLW 4437 (June 11, 1996)	<i>passim</i>
<i>South Carolina v. Katzenbach</i> , 383 U.S. 301 (1966)	20, 32, 34
<i>Stanley v. Illinois</i> , 405 U.S. 645, 92 S.Ct. 1208 (1972)	2
<i>State of Mississippi v. Smith</i> , 541 F.Supp. 1329 (D.D.C. 1982)	45
<i>State of Mississippi v. United States</i> , 490 F.Supp. 569 (D.D.C. 1979)	46
<i>State of Texas v. United States</i> , 785 F.Supp. 201 (D.D.C. 1992)	45
<i>Ward's Cove Packing Co. v. Atonio</i> , 490 U.S. 642, 109 S.Ct. 2115 (1989)	27
<i>Wells v. Edwards</i> , 347 F.Supp. 453 (M.D.La. 1972), <i>aff'd</i> , 409 U.S. 1095 (1973)	28, 36, 49
<i>Wygant v. Jackson Board of Education</i> , 476 U.S. 267 (1986)	24

CONSTITUTIONAL PROVISIONS

United States Constitution

Tenth Amendment	31, 32, 33, 34
Fourteenth Amendment	11, 17
Fifteenth Amendment section 2	32, 34

TABLE OF AUTHORITIES - Continued

Page

California Constitution

Article II, section 4	1
former Article II, section 1	5
Article IV, section 5 [as amended by Proposition 191]	8
Article VI, section 1	2
Article VI, section 2	2
Article VI, section 3	2
Article VI, section 4	2
Former Article VI, section 5(a)	2, 8, 19, 28, 43
Article VI, section 16(b)	9, 43

STATUTES

California Government Code

§ 23012	1
§§ 68801 et seq.	2
§§ 71001 et seq.	8
§ 71042	4, 20
§ 71140	9, 44
§ 71601	2
§ 71701	2
§§ 72000 et seq.	8
§ 73560	8, 19

TABLE OF AUTHORITIES – Continued

Page

California Penal Code

§ 2600..... 1

Cal. Stats. 1979,

chapter 694, § 1 8

Cal. Stats. 1989

chapter 608..... 8

Federal Voting Rights Act (42 U.S.C. §§ 1971 et seq.)

§ 2.....16, 17, 23, 47, 49

§ 5..... *passim*

42 U.S.C.

§ 1973aa..... 5

§ 1973b(b).....6, 46

§ 1973c..... 9, 22, 25

REGULATIONS

28 United States Code of Federal Regulations

§ 51.1 21

35 United States Code of Federal Regulations

Part 51 (Appendix) 6

TABLE OF AUTHORITIES – Continued

Page

35 Federal Regulations

12354 (July 24, 1970)..... 6

36 Federal Regulations

(No. 60) 5809 (Mar. 27, 1971) 6

OTHER AUTHORITIES

"Voting Information 1964," Department of
Defense, p. x..... 2

Huff, "How to Lie With Statistics," (Norton/1993) 27

Cal. Statistical Abstract 1995, p. 19, Table B-56, 33

Minteer, *Trial Court Consolidation in California*, 21

UCLA Law Review 1081, 1086 (1974) 2, 4, 20

Monterey County Ordinance No. 2930.....7, 8, 29

Pub. L. 89-110..... 5

RELEVANT BACKGROUND FACTS¹

The State of California has 58 counties, including defendant-appellee Monterey County (hereinafter "Monterey" or "the County"). (Cal. Gov. Code, § 23012.) In 1968, a presidential election year, Monterey included within its boundaries a large and active federal military installation, the Fort Ord Army Base, which served as a vital central training and staging base for the United States' military operations in the Vietnam War. The Naval Post-Graduate School was also located in Monterey. In addition, the County contained an important and sizable state penitentiary, Soledad State Prison, which remains operational today. In 1968, this prison housed "several thousand convicted felons,"² and Fort Ord's population alone (32,723) accounted for almost one-sixth of the County's total population. (See County's Response to Appl. for Stay, at p. 2 and fn. 2; see also D.E. 30, Ex. A, p. 58 [17% of County's 1970 population resided on military bases].)³

¹ Citations to the record will be in the following form, with page numbers: Joint Appendix: "J.A."; Appendix to Jurisdictional Statement: "J.S. Apx."; Appendix to State's Motion to Dismiss or Affirm: "State Apx."; Appendix to Judge Sillman's Motion to Dismiss or Affirm: "Sillman Apx." Appendix to this Brief: "Apx." Documents not included in the appendices will be cited by their docket entry ("D.E.") numbers. Appellants' Brief will be cited as "Lopez Brief."

² Under California law, state prisoners' voting rights are suspended during their incarceration. (Cal. Const., Art. II, § 4. And see former Cal. Penal Code § 2600; *Otsuka v. Hite*, 64 Cal.2d 596, 606 at fn. 5, 414 P.2d 412 (1966); *Ramirez v. Brown*, 9 Cal.3d 199, 217 at fn. 18, 507 P.2d 1345 (1973).) In 1990, Monterey's prison population was 5,996. (State Apx. 14a, 15a.)

³ Armed Forces personnel are typically registered to vote in their home states rather than the states in which they are based during military service. (*Carrington v. Rash*, 380 U.S. 89, 99, 85 S.Ct. 775, 782 (1965), Harlan, J., dissenting [Assumption that servicemen from other States stationed in Texas "are to be

California's judicial system consists, principally, of the State Supreme Court; the Court of Appeal, with six appellate districts; the superior courts, with 58 districts matching county boundaries; the municipal courts; and (until eliminated by statewide initiative measure in 1994) the justice courts. (Cal. Const., Art. VI, §§ 1-5; Cal. Gov. Code §§ 68801 et seq.) The latter three courts are trial courts. Justice courts, however, were distinct in several respects: they were smaller, generally more rural tribunals; they were not courts of record; judges elected thereto were not required to be state bar members (70% were non-attorneys in 1971); and such judges typically worked only part time.⁴ (Minteer, *Trial Court Consolidation in California*, 21 UCLA Law Review 1081, 1086 (1974); Cal. Gov. Code § 71601.) California law does not require that its state or county judicial districts be equipopulous, and they are not.

In 1968, in addition to its county superior court, Monterey's trial courts included two municipal court districts and seven justice court districts having very disparate sizes and populations. Using 1990 census figures, the resident populations of these independent judicial districts within the County ranged from a high of 146,858 (Salinas Municipal Court District) to a low of less than 3

treated as transients for voting purposes" is accurate. "in the vast majority of cases"]. And see "Voting Information 1964," Department of Defense, p. x, as quoted by the Court in *Carrington*, *supra*, 380 U.S. at 91, fn. 3 ["For voting purposes the legal residence of members of the Armed Forces is generally the State from which they entered military service"]; *Stanley v. Illinois*, 405 U.S. 645, 655, 92 S.Ct. 1208, 1215 (1972).)

⁴ Proposition 91, approved by California voters in November 1988, amended Article VI sec. 1 of the Cal. Const. to treat justice courts as courts of record beginning January 1, 1990. It also required judges thereof to work full-time and to meet the same minimum qualifications as municipal court judges. (See also Cal. Gov. Code § 71701 [justice court vacancies must be filled by attorney-judges beginning January 1975].)

percent of that figure: 3,891 (San Ardo Justice Court District). (State Apx. 14a; Sillman Apx. 49a-50a.) Judges for each of the County's municipal and justice court districts were elected only by the voters of their respective districts and, once elected, presided over only the judicial districts in which they were elected. (E.g., J.A. 129, fn. 3; D.E. 30, Ex. A, at 55-80.)⁵ Judges' caseloads also varied greatly according to their judicial districts; the several small rural justice court districts, which actually functioned primarily as traffic courts,⁶ had insufficient workloads to justify even a half-time judge, while judges in the

⁵ The United States misrepresents the operation of the County's municipal and justice courts in 1968, describing the "electoral changes" here at issue as "consolidation ordinances that transformed the County's system of electing municipal judges from a nine-district system to an at-large system . . ." (U.S. Brief at 14; emphasis added.) As the record makes clear, the 1968 system was *not* a single municipal court with nine electoral divisions; it did not even approximate such a system. Rather, there were seven small independently administered justice court districts – which were not courts of record and whose voters had no say whatsoever in municipal court elections – and there were two separate and independent municipal court districts, the judges of which sat only in the district from which they were elected. (E.g., J.A. 129, fn. 3; D.E. 30, Ex. A, at 55-80.) Each municipal court district had two judges; however, those judges did not "represent" electoral divisions within the district, but *were elected by at-large, district-wide vote*. (Appellants, too, describe the 1968 system using unnecessarily misleading language, and they falsely equate justice and municipal court judgeships. [E.g. Lopez Brief at 3 ("election districts") and 7.]) Further, it should be noted that, in the 1968 *municipal court districts*, Latino voters were not even close to a majority; even using 1990 census figures (which inflate their percentages), Latinos made up only 23 percent of one municipal court district (Salinas) and a mere 6 percent of the other municipal court district (Monterey-Carmel). (State Apx. 14a.)

⁶ The 1972 Judicial Council study shows traffic violations accounting for 80 to 94 percent of the seven justice courts' nonparking filings: Castroville-Pajaro, 92%; Pacific Grove, 80%;

larger municipal court districts were relatively overworked. (See D.E. 30, Ex. A, pp. 59-71.)⁷ The system was widely criticized as wasteful, inefficient, and inequitable. Commentators and experts – including the Chief Justice of the state Supreme Court and the Judicial Council of California, called for consolidation of the districts into a simpler, more practical, and more equitable model: namely, a single, centrally administered, countywide municipal court. (See D.E. 30, Ex. A, pp. 55-80; Minter, *supra*; and see J.A. 48-49.)⁸

The ratios of minority populations in Monterey also varied from district to district. A projection of 1990 census data on these 1968 judicial districts suggests that, with respect to adult (age 18 and older) citizens, Latinos may have constituted a majority in three of the very small justice court districts: the Gonzales district (54%); the Greenfield district (51%); and – if the prison population is excluded – the Soledad district (62%).⁹ If so, these were

Gonzales, 91%; Soledad, 83%; Greenfield, 90%; King City, 92%; and San Ardo, 94%. (See D.E. 30, Ex. A, p. 75 and fn. 5.)

⁷ According to the Judicial Council's 1972 study, the County's two municipal court districts, with two judges each, had "workload equivalents" justifying 2.0 (Salinas) and 2.3 (Monterey-Carmel) judicial positions. In contrast, the County's seven justice court districts had the following "workload equivalents," totalling 1.5 positions overall: Castroville-Pajaro, .5; Pacific Grove, .2; Gonzales, .1; Soledad, .2; Greenfield, .1; King City, .2; and San Ardo, .2. (See D.E. 30, Ex. A, pp. 59-71.)

⁸ The Judicial Council was directed by statute to conduct surveys of the operations of the courts and to make recommendations concerning possible consolidation or other modification " . . . with a view toward creating a greater number of full-time judicial offices, equalizing the work of the judges, expediting judicial business, and improving the administration of justice." (Cal. Gov. Code § 71042.)

⁹ Note that use of 1990 census data in this manner necessarily results in inflated figures for the 1968 minority populations since, as appellants have emphasized, the

"majority-minority" electoral districts in which Latino voters had the voting strength to elect the part-time justice court judge who presided over each small district. However, the total combined adult populations of these three "majority-minority" districts constituted only 6.6% of the County's overall adult population (State Apx. 14a; Sillman Apx. 49a-50a.) (In contrast, the combined adult populations of the two municipal court districts, in which Latinos made up only 6% [Monterey-Carmel] and 23% [Salinas] of the respective adult citizen populations, constituted over 73% of the County's total adults. (*Ibid.*)) And the total combined workload for the three justice court districts (.4) equated to less than half of a judicial position. (See fn. 7, *ante.*) Voters residing in the small justice court districts had no vote whatsoever in the larger municipal court districts, of which they were not a part.

Beginning in 1894, California's Constitution included a provision – effective as to all 58 of the State's counties – that imposed a literacy requirement for voters. (Cal.Const., former Art. II, sec. 1.)¹⁰ This literacy test was challenged in a 1967 lawsuit brought in state court, however, and the test was ultimately rejected and banned as unconstitutional by the state Supreme Court in March 1970. (*Castro v. State of California*, 2 Cal.3d 223 (1970).) (Later, on June 22, 1970, the Voting Rights Act ("VRA") was amended to also ban such literacy tests outright. See 42 U.S.C. § 1973aa; Pub. L. 89-110; and see, generally, *Oregon v. Mitchell*, 400 U.S. 112 (1970); cf. *Castro*, 2 Cal.3d at 231-232, fn. 15.) California's test was formally repealed

population of Latinos in Monterey County has dramatically increased relative to non-Latinos since 1980. (Lopez Brief at 5; J.S. Apx. 94, ¶ 4.)

¹⁰ Former Article II, section 1 provided, in pertinent part, that " . . . no person who shall not be able to read the Constitution in the English language and write his or her name, shall ever exercise the privileges of an elector in this State: . . . " (*Castro v. State of California*, 2 Cal.3d 223, 225 (1970).)

by the People at the statewide general election held on November 7, 1972.

In 1970, Monterey County became subject to federal "preclearance" requirements under Section 5 of the VRA. This status was imposed not because any voting practice in the County was shown to have had a discriminatory purpose or discriminatory effect, but rather merely by a mechanical application of Section 5 coverage standards to happenstance. Thus, the County became a "covered jurisdiction" under Section 5 "on and after August 6, 1970," only because (1) on November 1, 1968, the California Constitution still included the aforesaid statewide literacy test for voting (which, by August 1970, had been discontinued), and (2) the Census Bureau determined that fewer than 50% of the voting age residents in the County had voted in the November 1968 presidential election. (See 42 U.S.C. § 1973b(b); 35 C.F.R. Part 51 (Appendix); 35 Fed.Reg. 12354 (July 24, 1970); 36 Fed.Reg. (No. 60) 5809 (Mar. 27, 1971).) Of the remaining 57 California counties, only one other – Yuba County – was similarly deemed to be a covered jurisdiction at this time. (*Ibid.*) In 1990, Yuba County's population was 11.6 percent Hispanic. (*Cal. Statistical Abstract 1995*, p. 19, Table B-5.)

Between 1972 and 1983, Monterey promulgated a series of ordinances which, consistent with the Judicial Council's policy recommendations (D.E. 30, Ex. A, at 55-80), ultimately consolidated the County's seven, variously-sized, independent justice court districts and its two independent municipal court districts into a single, countywide municipal court.¹¹ The election system

¹¹ The evolution of these consolidations may be briefly summarized: In 1972, Monterey County Ordinance No. 1852 was adopted, reducing the number of judicial districts from ten to nine; two municipal court districts and seven justice court districts. Ordinance No. 1917, adopted eight months later, reduced the number of districts to eight by merging the Soledad and Gonzales justice court districts. Thirteen months later, in

remained the same throughout this transition: that is, in the final countywide municipal court district, just as in Monterey's previous, smaller, independent judicial districts, every qualified voter within a given judicial district was entitled to vote in the election of every judge of that district.¹²

These ordinances were part of a consolidation effort that began in the early 1950's, when the County had 22 separate judicial districts (*Ibid.*), and reflected a statewide program that, between 1953 and 1990, reduced the total number of judicial districts in the State from 400 to 149. (D.E. 27, Ex. 1, p. 3.)¹³ Although most of Monterey's

1973, Ordinance No. 1999 was adopted, reducing the number of districts to seven by merging the King City and Greenfield justice court districts. In 1977, the San Ardo and King City-Greenfield justice court districts were consolidated by Ordinance No. 2139, which also merged the Pacific Grove justice court district into the Monterey-Carmel Municipal Court, leaving five judicial districts (four of which were later renamed). Two of these five were eliminated by Ordinance No. 2524, adopted in 1980, which merged the North Monterey Justice Court District, the Salinas Municipal Court District, and the Monterey Peninsula Municipal Court District into the Monterey County Municipal Court District. Finally, through adoption of Ordinance No. 2930 in 1983, the two remaining justice court districts ("Central" and "Southern") were merged into the municipal court to form a single judicial district, the Monterey County Municipal Court District. (D.E. 27, Ex. 2, pp. 1-3; and see J.A. 49.)

¹² The situation in 1972 represents the baseline, or "status quo," for Plaintiffs' Section 5 claim, and shall be referred to hereinafter, in the manner adopted by the district court, as "the 1968 plan." (See Lopez Brief 7; J.A. 29-33, 129 at fn. 3; State Apx. 14a; Sillman Apx. 49a-50a.)

¹³ Consolidation of municipal and justice courts into single, centrally administered, countywide courts was quite common in California. By June 1983, 14 other counties had adopted countywide municipal court plans; at least three more counties had studies in progress. (D.E. 30, Ex. A, p. 52.)

consolidation ordinances were unprecleared when plaintiffs filed their complaint, the final ordinance – No. 2930 – had in fact been precleared. (U.S. Brief at 15-16, fn. 10.)

Meanwhile, the State of California – which is not a Section 5 covered jurisdiction – took several independent legislative actions affecting the number and configuration of municipal courts and justice courts in Monterey. In 1979, for example, the state Legislature *repealed* an earlier article relating to municipal courts in Monterey and declared the existence of a new municipal district. (Cal. Stats. 1979, ch. 694, § 1.)¹⁴ The legislature subsequently amended that statute in 1989 (Cal. Stats. 1989, ch. 608), redefining the Monterey County Municipal Court District to be a single district encompassing the entire county. (Cal. Gov. Code § 73560.)¹⁵ And in November 1994 the People of the State of California, through their initiative power, amended their state Constitution to altogether eliminate justice courts throughout the State. (See Cal. Const., art. IV, § 5 [as amended by Proposition 191].)

The State's Constitution and statutes also contain many provisions governing the general administration and organization of the State's courts, including municipal courts and, before they were abolished, justice courts. (See, e.g., Cal. Gov. Code §§ 71001 et seq., 72000 et seq.) Among these are requirements that municipal court districts include at least 40,000 residents (Cal. Const. art. VI,

¹⁴ Section 1 of chapter 694 of the Statutes of 1979 provided:

There is in the County of Monterey, on and after the effective date of this section, a single municipal court district which embraces the former Salinas Judicial District, Monterey Peninsula Judicial District and North Monterey County Judicial District. This article applies to the municipal court established within the judicial district which shall be known as the Monterey County Municipal Court.

¹⁵ Former Cal. Const., art. VI, § 5(a) provided, *inter alia*, that "[t]he Legislature shall provide for the organization and prescribe the jurisdiction of municipal and justice courts."

sec. 5(a)); that cities not be split into more than one district (*Ibid.*); that judges' jurisdictional bases and electoral bases be coterminous (Cal. Const. art. VI, sec. 16(b); and see *Koski v. James*, 47 Cal.App.3d 349, 354 (1975)); and that municipal court judges be residents of the judicial districts to which they are elected or appointed. (Cal. Gov. Code § 71140.)

With its consolidated, countywide municipal court district in place, the County conducted at-large municipal court judicial elections in 1986, in 1988, and again in 1990. Before that, of course, it also conducted judicial elections for various interim consolidated judicial districts in 1974, in 1976, in 1978, and in 1982. During this period, none of the County's consolidation ordinances was subjected to a VRA challenge.

PROCEDURAL HISTORY OF THE CASE

On September 6, 1991, Plaintiffs, five Latino voters residing in the County, brought this action against Monterey under Section 5 of the VRA (42 U.S.C. § 1973c), alleging only that Defendant County had committed a violation of Section 5 by neglecting to obtain "preclearance" before implementing the series of historic county ordinances – *promulgated between 1972 and 1983* – consolidating the County's variously-sized municipal court and justice court districts into a single county-wide municipal court district. (J.A. 27-35.)¹⁶

On March 31, 1993, after hearing cross-motions for summary judgment, the three-judge district court held that the challenged historical ordinances – some of which were adopted more than 20 years before – "could not be implemented" in the absence of preclearance. (J.A. 47-59.) The court also denied the County's motion to name the State as an indispensable party defendant (*Id.* at 52), an

¹⁶ Monterey did not raise either a laches defense or a statute of limitations defense to plaintiffs' action.

order which the court would later vacate and reverse in November 1995. (J.A. 173.)

Pursuant to the court's directive (*see* J.A. 59), Monterey then filed a declaratory judgment action in the United States District Court for the District of Columbia, seeking to have the challenged ordinances precleared after the fact. (*County of Monterey v. United States of America*, No. 93-1639 (D.D.C., filed Aug. 10, 1993).) At that point, however, the parties ceased to litigate the case as adversaries.¹⁷ Before the D.C. court made any findings, the County abandoned its preclearance effort, voluntarily dismissing its action through a stipulation with the plaintiffs herein. Monterey stipulated that its Board of Supervisors was "unable to establish that the [consolidation ordinances] . . . did not have the effect of denying the right to vote to Latinos . . . " (J.A. 126.)

Defendant and Plaintiffs began to proceed by stipulation in the instant case as well. The County and Appellants twice submitted stipulations to the court below, asking the court to authorize proffered "remedial" election plans notwithstanding the fact that the unprecedented "electoral divisions" and methodologies devised therein would have violated controlling provisions of state statutes and of the California Constitution. (Sillman

¹⁷ As County Counsel explained it to the court, Monterey sought to resolve the lawsuit and to "shortcut" the remedial process "to hopefully avoid some of the very, what we thought, egregious types of remedies that the plaintiffs were offering or suggesting." (D.E. No. 161 at 19-20.) By cooperating with Appellants and abandoning its consolidation ordinances, Monterey also sought to minimize its exposure to liability for Appellants' attorney fees. (*See* Apx. 1a-3a [parties' October 1993 "Memorandum of Agreement"].)

Apx. 3a-19a; J.A. 131-132)¹⁸ At that point, the State of California intervened and objected to these proposed plans, arguing that neither Plaintiffs nor the County had shown any necessity for the court to override state law. (J.A. 60-68, 76-85.)¹⁹ The court agreed, rejecting the parties' first and second stipulations and declining to order an election. Monterey was directed to devise and to submit for preclearance an election plan that complied both with the VRA and with all applicable provisions of the state Constitution and state law. (J.A. 91.)

Instead, Monterey joined Plaintiffs in filing yet another stipulation, this time purporting to show why the County "was unable" to submit an election plan consistent with the court's order. (J.S. Apx. 92-108.)²⁰ On June 1,

¹⁸ In these stipulations, Plaintiffs admitted finding no evidence of discriminatory motive or purpose in the County's adoption of the challenged historic ordinances:

Plaintiffs acknowledge that as of the date of this Stipulation they had not discovered any evidence that Monterey County's adoption of the municipal court judicial district consolidation ordinances had the purpose or the intent of denying or abridging the right to vote within the meaning of Section 5 of the Voting Rights Act.

(*See* Sillman Apx. at 4a, ¶ 3; 12a, ¶ 3. *See also* the court's November 1, 1995 order (J.A. 167) ["Further, neither the plaintiffs nor the County suggest that there is any evidence of purposeful discrimination in the enacting of the consolidation ordinances"].)

¹⁹ The State also objected on the ground that the proposed racially drawn "electoral divisions" violated the Equal Protection Clause of the Fourteenth Amendment. (J.A. 115-120.)

²⁰ Most of the "facts" asserted in this stipulation, while perhaps relevant in a Section 2 action, had no bearing on the court's limited inquiry in this Section 5 action. (*See* J.S. Apx. 92-108; *Bossier Parish School Board v. Reno*, 907 F.Supp. 434, 445 (D.D.C. 1995).) In any event, as the State pointed out in response, the stipulation was insufficient to warrant suspension

1994, the court enjoined Monterey from holding municipal court elections pending adoption and preclearance of an appropriate plan (J.A. 103-110): "The court wishes to underscore the urgency with which it views Monterey County's responsibility to develop and preclear a plan that complies with state and federal law." (*Id.* at 108.) The County did not develop such a plan.

On December 20, 1994, the court, frustrated with the County's failure to present and to preclear an adequate plan, and mindful of the delays experienced by voters, determined " . . . that [the court's] remedy must allow for an election pending implementation of a permanent legislative solution." (J.A. 129-130.)²¹ Under the court's one-time, emergency, December 1994 order, the municipal court remained a single countywide district for jurisdictional and administrative purposes, with judges thereof sitting over the entire county. However, for election purposes, this single district was divided into four discrete race-based "electoral divisions," with no requirement that judicial candidates reside in the sub-district in which they stood for election. Voters in one "division" of the district were not permitted to vote for judicial positions assigned to other "divisions." (J.A. 124-127; *and see* Sillman Apx. 13a-14a.) Judges' terms under this scheme were shortened by the court to expire on the first Monday in January 1997.

This one-time election plan, though it generally coincided with the scheme proposed in the parties' second stipulation and previously rejected by the court, "[was] not being implemented as a legislative solution to the existing

of state law even if the assertions therein were taken as true. (J.A. 93.) The State further objected that the County, by entering this stipulation, had improperly purported to determine disputed and unresolved questions of law to the detriment of the State and itself. (*Id.*)

²¹ The district court's Dec. 20, 1994 ruling (J.A. 123-137) is also published as *Lopez v. Monterey*, 871 F.Supp. 1254 (1994).

[VRA] problem facing the County, but [was] rather being implemented by the court as an interim, emergency solution to insure the voters' right to elect municipal court judges." (J.A. 134, fn. 7; emphasis added.) The court viewed its order as an emergency measure which was to have no limiting or precedential effect on subsequent legislative plans: "[U]ltimately an at-large system . . . may prove, under the totality of circumstances, to be the best judicial election scheme." (*Id.* at 132.) The court emphasized this point repeatedly: "The court does not intend by this order to pass judgment on the merits of the proposed election area plan as a potential permanent plan. That judgment is best left to legislators." (*Id.* at 136, fn. 8.)

The court rejected the state's Equal Protection argument against racially drawn election divisions for want of judicial precedent supporting that theory: "The concern of the State . . . that an election area plan may violate the Equal Protection clause of the Fourteenth Amendment seems unfounded. *No case has been cited which comes to that conclusion.*" (J.A. 135-136; emphasis added. *But see* this Court's recent opinions in *Miller*, *Shaw II*, and *Bush*, discussed *infra*.)²²

Under the court's December 1994 plan,²³ Latino voters – who in 1968 were the majority in, at most, only three small independent justice court districts with part-time, locally elected judges who presided over only 7.5 percent of the County's population – now had majority voting power in explicitly race-based "divisions" encompassing more than 27 percent of the County population; and could now elect three full-time municipal court judges, each of whom sits on a countywide district and

²² Meanwhile, in early 1995, the Governor appointed three new judges – two Hispanics and an African-American – to existing vacancies on the municipal court.

²³ The County later conceded that the "electoral divisions" of this emergency December 1994 plan were exclusively race-based. (*See* Arg. III, *infra*.)

presides over 100 percent of the population. (State Apx. 14a, 15a; Sillman Apx. 50a, 52a.) The geographical configuration of the December 1994 majority-minority "divisions" was unrelated to the boundaries of the three 1968 justice court districts in which Latinos may have constituted a majority of eligible voters. (Compare maps, Sillman Apx. 49a [Soledad, Gonzales, and Greenfield] and 51a [Divisions 1, 2, and 3].)²⁴

On June 29, 1995, this Court filed its decision in *Miller*, 115 S. Ct. 2475. In early September, the district court directed all parties to brief the impact of *Miller* for discussion at a status conference already calendared for the end of the month. (J.A. 163.) All members of the three-judge court were present at the status conference, where *Miller* was discussed extensively. In response to a pointed question from Judge Whyte, the County admitted that the "electoral divisions" employed by the court in its December 1994 emergency election order *were entirely race-generated*. (State Apx. 13a.)²⁵

²⁴ The election, held in 1995 pursuant to the court's emergency plan, resulted in the selection of an African-American judge and of two Latino judges, one who ran unopposed, and another who defeated an incumbent Latino judge theretofore appointed by the Governor. (See J.S. Apx. 111.) Ironically, this same racial mix of judges might well have been repeated under the scheduled 1996 *countywide* election, if this Court had not stayed that vote. Based on pre-election candidate declarations and, in one case, non-opposition "*it [was] certain that the Municipal Court [would] have one African American judge and at least one Hispanic judge . . . and perhaps two.*" (See Sillman Response to Stay Application, at 18; emphasis added.)

²⁵ The State noted that no retrogression or discrimination had been found by any court in this matter, and that retrogression would be an elusive concept, in any event, due to enormous differences in population among the County's various 1968 justice court and municipal court districts. The State repeated its Equal Protection concerns, now supported by *Miller*, and urged the court to direct a countywide election. (D.E. No 161, pp. 4-12; 35-45.)

On November 1, 1995, the district court issued its interlocutory Order Modifying Injunction – the subject of this appeal. (J.A. 165-173.) The court observed that the validity of its previous emergency election order was at best questionable in light of this Court's decision in *Miller*: "The Supreme Court in [*Miller*] has cast substantial doubt upon the constitutionality of extending the duration of the previously ordered emergency, interim plan, as that plan used race as a significant factor in dividing the County into election areas." (J.A. 167.) Noting that "*Miller* raises substantial doubt as to whether legislative division into race based districts or election areas can ever withstand constitutional scrutiny," the court concluded "that it should allow a county-wide election of municipal court judges in 1996 but enjoin elections thereafter pending preclearance of a permanent plan that complies with the [VRA] and state law." Judges elected in 1996 would serve normal, six-year terms. (*Ibid.*)

The court's election plan avoided several serious shortcomings inherent in the race-based December 1994 plan: it eliminated the kind of racial stereotyping criticized by this Court in *Miller*; it permitted each qualified voter in the judicial district to cast a vote for each judgeship therein; and it made each elected judge accountable to the entire population of his/her district rather than to only a discrete, racially defined "division" thereof:

A county-wide election system does not assume that voters of a particular race or ethnicity will vote for the same candidates. It allows each voter one vote for each of the judicial offices. It makes the judges elected responsive to all citizens and avoids any risk of pressure on judges to respond to particular electoral constituents. See, *Nipper v. Smith*, 39 F.3d 1494, 1542-1547 (11th Cir. 1994) cert. denied, ___ U.S. ___, 115 S. Ct. 1795.

(J.A. 171.)

The court issued its modified injunction "[p]ursuant to its equitable power to effect a remedy" (*Id.* at 173),

observing that a return to the status quo would not be "legal, feasible or desired." (*Id.* at 167.) The court also declined to accept the parties' stipulation that Monterey was unable to establish that the historic consolidation ordinances did not have a retrogressive effect. (*Id.* at 167.)²⁶

The court also ordered the State joined as an indispensable party defendant and reopened the threshold issue of Section 5 liability in the case, expressly inviting the State to seek dismissal of the action on grounds not heretofore considered:

The court also reconsiders its prior decision that the State should not be joined as an indispensable party. Since the State now argues that 'in conducting municipal court elections, the County is not 'administering' its consolidation ordinances at all, but is instead 'administering' a *state statute* that defines the municipal court district to encompass the entire county,' (State's Status Conference Memorandum, page 2, lines 12-14), the State clearly must be brought into this action in order to bring about a complete resolution of the issues. If the State believes that the County is only administering a State statute and that the failure to preclear the consolidation ordinances is of no significance, it can seek to

²⁶ The court had previously rejected stipulations proffered by appellants and the County to suggest that the consolidation ordinances may have violated Section 2 of the VRA. ((J.S. Apx. 92-108); J.A. 130, fn. 4.) To the extent that the district court may have appeared, in its previous orders, improperly to give weight or credence to proffered stipulations concerning "retrogression" or Section 2 "discrimination," it *reversed* itself in this respect in its November 1, 1995 order, holding that "this case is not a Section 2 case" and that, in light of *Miller*, "the court cannot say that a county-wide election plan is necessarily unlawfully retrogressive . . ." (J.A. 172; *cf.* J.A. 106, 130 at fn. 4, 132.) Appellants concede this change in the court's position. (Lopez Brief at 33, fn. 24.)

lift the injunction and have this Section 5 litigation dismissed.

(J.A. 172; emphasis in original.)

SUMMARY OF ARGUMENT

In three recent opinions concerning States' congressional redistricting plans, this Court has addressed the propriety of imposing racially discriminatory districts as a remedy for VRA violations.

In *Miller*, Georgia complied with the demands of the U.S. Department of Justice ("DOJ") and the American Civil Liberties Union ("ACLU") to maximize minority voting strength by making race "the predominant, overriding factor" in configuring election districts. (*Id.* at 2484, 2489.) Applying a "strict scrutiny" test, this Court rejected the Georgia plan, holding (1) that the racial stereotyping and discrimination demanded by DOJ was not compelled under the VRA, notwithstanding Georgia's past discrimination and covered status, and (2) that Georgia's race-based reapportionment plan violated the Equal Protection guarantee of the Fourteenth Amendment, despite having been precleared by DOJ. (*Id.* at 2492-2494.)

In *Shaw II* (*Shaw v. Hunt*, __ U.S. __, 64 USLW 4437 (June 11, 1996)), the Court rejected a North Carolina race-based reapportionment plan, promoted and precleared by DOJ, because the plan's racial stereotyping was not narrowly tailored to serve a specific and compelling state interest as required under the Fourteenth Amendment, notwithstanding "the sorry history of race relations in North Carolina" (*Id.* at 4440, fn.4) and the state's professed desire to avoid litigation and liability under Sections 2 and 5 of the VRA.

And in *Bush* (*Bush v. Vera*, __ U.S. __, 64 USLW 4452 (June 11, 1996)), DOJ had precleared a Texas plan that sought to maximize minority voting strength by subordinating traditional districting criteria in favor of race. Again, this Court subjected the plan to strict scrutiny and rejected it as violative of the Fourteenth Amendment,

notwithstanding Texas' long history of discrimination. The Court held that race-based remedies are not justified absent a showing that they are necessary to neutralize specific, identified discrimination. (*Id.* at 4461.) The Court further held that Section 5 seeks only to *maintain* pre-existing minority voting strength, and cannot be used to justify the "substantial augmentation" thereof. (*Ibid.*)

The principles announced in *Miller*, *Shaw II*, and *Bush* control here, where Appellants urge the Court to endorse a racially discriminatory districting plan – this time without any showing of injury, much less of necessity. Further, the context of the "districting" question here makes those principles even more compelling: Here, the election system at issue is not a traditional or required districting plan for legislative representatives charged with responsibility to promote the interests of their constituents, but a *municipal court structure* for state court judges sworn to be impartial. Here, due to the passage of time and to intervening state laws, the district court may yet determine that Section 5 preclearance requirements are not even implicated in the current judicial election scheme. Here, the very election system advocated by Appellants, DOJ, and the ACLU – the creation of new race-based "electoral divisions" *within* a judicial district – violates state law and is unprecedented in the County, which has heretofore had only district-wide elections. And here, there is no identified discrimination or retrogression – quantified or otherwise – requiring correction. Even if there were retrogression, the particular race-based plan advocated by Appellants, and endorsed by DOJ and the ACLU, bears no rational relationship to pre-consolidation minority voting strength, whether gauged by demographics or by geography, and it patently offends the Fourteenth Amendment.

Accordingly, the district court's careful, well reasoned November 1995 order, directing that an interim judicial election be conducted in a manner consistent with state law and with race-neutral principles, should be affirmed.

ARGUMENT

I. THE DISTRICT COURT DID NOT REFUSE TO INTERVENE

Appellants and their *amici* do a great disservice to the district court by repeatedly mischaracterizing its November 1995 modified injunctive order as an "order to implement an election plan that has not been approved pursuant to Section 5" (Lopez Brief, p. 2); "dissolv[ing] an injunction that had prohibited Monterey County, a covered jurisdiction, from implementing an unprecleared, at-large voting plan" (ACLU Brief, p. 3); and "reinstat[ing] the County's unprecleared at-large plan" (U.S. Brief, p. 9).

The court's order was issued "[p]ursuant to [the court's] equitable power to effect a remedy." (J.A. 180.) "The order reflects *what the court believes is the appropriate temporary, equitable remedy* pending preclearance of a plan that complies with the [VRA] and does not violate state law." (J.A. 184.)²⁷ Indeed, the court took great pains to explain the many considerations and the careful reasoning that led to its conclusion. (*See* J.A. 166-173.)

Even if the court's plan could be characterized as "reinstating" the status quo that had existed for eight years before Plaintiffs filed this action, of course, that prior scheme is more accurately described as the *State's* plan – not the unprecleared plan of the County. State law had, since 1989, defined Monterey's Municipal Court as a single, countywide district (Cal. Gov. Code § 73560); the state Constitution had, in 1994, eliminated all justice courts (Cal. Const., Art. VI, § 5); and the single, countywide district is consistent with statewide policy (D.E.

²⁷ *See also* Reporter's Transcript of 9/28/95 hearing, wherein Judge Sillman's counsel urged the court to "enter *its own* order for countywide elections," as distinguished from "go[ing] forward with elections under ordinances . . . found . . . to be un-precleared". (D.E. No. 161, p. 52; emphasis added.)

30, Ex. A, pp. 55-80; Minter, *supra*; Cal. Gov. Code § 71042) and statewide practice (D.E. 30, Ex. A, p. 52). Long before the court issued its interim injunctive order in November 1995, the challenged county ordinances had been rendered irrelevant and moot by superseding state law. (See Arg. II C, *infra*.) California is not a "covered jurisdiction" under Section 5. And the covered jurisdiction – the County – no longer proposed a countywide plan in November 1995, but instead endorsed race-based "electoral divisions." (See Stipulations [Sillman Apx. 3a, 11a]; D.E. No. 161; Apx. 1a-3a.) Thus, it is quite inaccurate to describe the court's election order as acceding to or implementing the County's plan. The County joined Plaintiffs in opposing the court's plan. (D.E. 151, 152, 161.)

II. THE COURT HAD NO DUTY TO "REMEDY" DISCRIMINATION OR RETROGRESSION BECAUSE NONE WAS ESTABLISHED; NEITHER HAS A MATERIAL SECTION 5 VIOLATION YET BEEN FOUND

Appellants and their *amici* cite a host of cases standing for the proposition that, when the VRA has been violated, a district court is required to fashion a remedy that counteracts the "discrimination" and/or nullifies the "retrogression." (See, e.g., *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966); *McDaniel v. Sanchez*, 452 U.S. 130, 148 (1981); *Louisiana v. United States*, 380 U.S. 145, 154 (1965).)

The State has no quarrel with these laudable principles in the abstract. However, these general precepts have no relevance or application here, where the district court was not required to issue "remedial orders" of any dimension, because neither discrimination nor retrogression has been established. Indeed, the district court has not yet finally determined even the threshold question whether this case presents a material violation of the VRA. (See Arg. II C, *infra*.) Under these circumstances, the district court's November 1995 order is immune from Appellants' challenges, and must be affirmed.

A. No Discrimination Has Been Alleged or Proven

Plaintiffs' complaint alleges only that, long ago, Monterey committed a breach of Section 5 by implementing a series of ordinances between 1972 and 1983 without first preclearing them. Appellants have not alleged that the County violated Section 2 of the Act, or that county authorities engaged in any form of purposeful discrimination. To the contrary, Appellants have conceded that, to their knowledge, county authorities harbored no discriminatory motive or purpose in adopting the historic county ordinances that are challenged in this action. (See fn. 18, *ante*.)²⁸ Accordingly, the myriad "discrimination" cases cited by Appellants and their supporting *amici* – calling for courts to right egregious wrongs – are plainly beside the point, and may be readily distinguished on their facts alone.²⁹

²⁸ See also the November 1, 1995 order: "Further, neither the plaintiffs nor the County suggest that there is any evidence of purposeful discrimination in the enacting of the consolidation ordinances." (J.A. 167.) Appellants' purported Section 2 evidence (J.S. Apx. 92-108), which would appear inconsistent with its stipulation, has no place in this proceeding in any event. (See, e.g., *Holder v. Hall*, 512 U.S. ___, 114 S.Ct. 2581, 2587 (1994) [mere fact that voting change must be precleared does not make the practice subject to Section 2 vote dilution challenge]; *Bossier*, 907 F.Supp. 434, 445 ["section 2 and its standards have no place in a section 5 preclearance action," and court "will not permit section 2 evidence to prove discriminatory purpose under section 5"]; *Miller*, at 2491 [mere assertions or stipulations that remedy is required are insufficient to justify racially based "remedial" plan].)

²⁹ Indeed, even this Court's recent decisions overturning "remedial" orders, *Miller*, *Shaw II*, and *Bush*, are distinguishable from this case in that the call for remedial relief was far more compelling there.

The only discrimination present in this case is the radical, race-based, December 1994 "remedial" plan that the district court properly rejected in November 1995.

B. No Retrogression Has Been Established

As appellants concede, the exclusive tribunal to determine whether challenged voting changes are "retrogressive" under the VRA is the United States District Court for the District of Columbia. (Lopez Brief 28-29, 40; 42 U.S.C. 1973c.)³⁰ It is undisputed that this designated tribunal has not ruled on retrogression or preclearance in the instant case.³¹ Nevertheless Appellants argue that retrogression should be *presumed*, or should be *inferred* from vague stipulations and patently inaccurate statistical and demographic comparisons. (E.g. Lopez Brief 30, 40-41. *And see* U.S. Brief 12-18; ACLU Brief 8-12.) They are in error.

1. Appellants' Stipulation Does Not Establish Retrogression

The chief fact cited by Appellants to support their claim of retrogression is a stipulation that they entered into with the County. Pursuant to that stipulation, the County halted its effort to preclear the disputed ordinances and voluntarily dismissed its action for declaratory judgment in the district court for the District of

³⁰ For Section 5 preclearance, the only relevant question is whether an enactment, assuming that it constitutes a change with respect to voting (*cf.* Arg.II(C)(4), *infra*), is "retrogressive" when compared to the previous electoral system. (*See Holder v. Hall, supra*, 114 S.Ct. at 2587, and *see Lockhart v. United States*, 460 U.S. 125, 129 n.3, 103 S.Ct. 998, 1001 n. 3 (1983).) And this adjudication can be made only by the District Court for the District of Columbia. (*Perkins v. Matthews*, 400 U.S. 379, 385, 91 S.Ct. 431, 435 (1971). 42 U.S.C. 1973c; 28 C.F.R. § 51.1)

³¹ The court below likewise noted the absence of any finding of retrogression here. (J.A. 171-172.)

Columbia – without prejudice – before that court could make any findings concerning preclearance or the related issue of retrogression. (*County of Monterey v. United States of America*, No. 93-1639 (D.D.C., filed Aug. 10, 1993).) The stipulation included the following provision:

The Board of Supervisors is unable to establish that the Municipal Court Consolidation Ordinances adopted by the County between 1968 and 1983 did not have the effect of denying the right to vote to Latinos in Monterey County due to the retrogressive effect several of these ordinances had on Latino voting strength in Monterey County.

(J.A. 126; and *see* Sillman Apx. 4a, ¶ 3.)

But this stipulation is, on its face, so vague and imprecise as to be meaningless. It demonstrates no retrogression, no cause, no measure, no quantification, no analysis. The mere fact that the Board deemed itself "unable to establish" something does not, of course, prove the opposite proposition.³² And we are not told *why* the Board felt itself unable. Was it a problem of limited fiscal resources or personnel? Of inability to reach consensus? Neither does the stipulation tell us *which* of the ordinances, if any, was seen as posing a substantive problem, or *why*. (The reference to "several of these ordinances" is particularly mysterious; County Counsel later agreed that "some of these changes clearly didn't have a retrogressive effect . . ." (D.E. No. 161, p. 15).) It is not clear whether the Board even believed that retrogression had occurred; after all, the dismissal was *without prejudice*. If the Board did so believe, it neglected to identify the ordinance(s), or to explain the perceived problem, or to quantify the perceived retrogression, or even to

³² Even if it did, this would be a case in which there is no appropriate remedy (*See Nipper v. Smith*, 39 F.3d 1494, 1532 (11th Cir. 1994) *cert. denied* ___ U.S. ___, 115 S.Ct. 1794 (1995) [no remedy ordered even where Section 2 violation established; *see also* Arg. IV, *infra*])

explain what it meant by the term "retrogressive effect." Its stipulation is far too conclusory and nebulous to support any tailored "remedial" response:

Although we have not always provided precise guidelines on how closely the means (the racial classification) must serve the end (the justification or compelling interest), we have always expected that the legislative action would substantially address, if not achieve, the avowed purpose. (See *Miller, supra*, at ___ (slip op., at 21) ("[T]he judiciary retains an independent obligation . . . to ensure that the State's actions are narrowly tailored to achieve a compelling interest"); *Wygant*, 476 U.S., at 280 (opinion of Powell, J.) ("[T]he means chosen to accomplish the State's asserted purpose must be specifically and narrowly framed to accomplish that purpose") *id.*, at 278, n. 5 (opinion of Powell, J.) (race-based state action must be remedial); *Shaw I*, 509 U.S., at ___ (slip op., at 23) ("A reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression"). Cf. *Missouri v. Jenkins*, 515 U.S. ___, 115 S.Ct. 2475 (1995) (slip op., at 16) (With regard to the remedial authority of a federal court: "the remedy must . . . be related to 'the condition alleged to offend the Constitution. . . .'" and must be "remedial in nature, that is, it must be designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct'").

(*Shaw II*, 64 USLW at 4442; emphasis the Court's.)

Even if the County's stipulation did not suffer from the foregoing flaws, it could not take the place of specified findings in a judgment from the district court for the

District of Columbia; the court below would still lack authority to adjudicate the question of retrogression. (42 U.S.C. 1973c; *Perkins v. Matthews*, 400 U.S. 379, 385, 91 S.Ct. 431, 435 (1971).) Furthermore, mere concessions or stipulations cannot justify discriminatory "remedial" orders of the kind here promoted by Appellants and their amici:

When a state governmental entity seeks to justify race-based remedies to cure the effects of past discrimination, we do not accept the government's mere assertion that the remedial action is required. Rather, we insist on a strong basis in evidence of the harm being remedied. [Citations omitted.]

(*Miller*, 115 S.Ct. at 2491; and see Arg. III D, *infra*.) Accordingly, the County's vague stipulation is immaterial to the issues and was properly rejected by the district court. (J.A. 171-172.) Retrogression, if any, remains to be established.³³

³³ The stipulation may also be a product of the County's own confusion about how retrogression might be defined and measured. This confusion, no doubt fed by Appellants' ardent and repeated comparison of "apples to oranges", is clearly evident in the example of "apparent retrogression" which Monterey described when, at the September 1995 hearing, the court inquired whether DOJ might be more likely to preclear the consolidation ordinances in light of *Miller*. County Counsel Douglas Holland noted that attorneys for DOJ (referred to in error as "intervenors") had "indicated a concern" that one specific ordinance could not be precleared because it combined two small justice court districts having Latino majorities - Gonzales and Soledad - into one larger justice court district which retained a Latino majority. (See State App. 14a; Sillman App. 50a.) Although Latino voting strength in this combined district remained sufficient to elect the judge who presided over that small merged area, Holland predicted that the County would "have a very difficult time showing that that was not retrogressive." Why? Simply because "[i]t lost one judge in that area." (D.E. No. 161 at 14-15.) Manifestly, no reasonable retrogression analysis could

2. Appellants' Deceptive "Apples-to-Oranges" Comparisons Show Nothing

To further bolster their claim of retrogression, the Appellants engage in a mechanistic contrasting of the numbers of judges elected from majority-minority districts currently and in 1968. In this approach, Appellants argue that the 1968 plan had three judges (of 11 total judges) elected from majority-minority districts, while a countywide scheme has none. In this "analysis," Appellants treat all judgeships as equal, regardless of the districts' respective populations or geographical sizes, or the respective caseloads of the judges, or their respective time-bases, or whether they were municipal or justice court judges. (E.g. Lopez Brief at 41.) Also downplayed, or lost altogether, in Appellants' "analysis" is the fact that *judges elected under the 1968 scheme did not sit on a countywide court, but presided only in the discrete and independent judicial district in which they stood for election.* (J.A. 129, fn 3; D.E. 30, Ex. A, 55-80.) In contrast, judges elected to the single consolidated municipal court from "electoral divisions" under the December 1994 race-based plan, *preside over the entire county* – even though their electorate may be only 10% of the County's total voting age population.³⁴

proceed in this "apples to oranges" fashion, blindly contrasting the "numbers of judges" without reference to district size, caseload, judge's time-base, type of court, or even changes in population proportions. Such "analysis," whether it is DOJ's or the County's or both, is patently specious. (See section 2, *infra*.) In fact, this early consolidation cited by the County merely merged two part-time judgeships having, respectively, the workload equivalents of 0.1 and 0.2 judgeships, into a single new judgeship with a workload equivalent of 0.3 judicial positions. (See fn. 7, *ante*.)

³⁴ To be sure, locally elected municipal court judges may, under the state system, occasionally be assigned by the Chief Justice of the state Supreme Court to sit in other districts within or outside their counties as needed. (See J.A. 134-135.) However,

Because it disregards these obvious and important distinctions and treats the districts as if they were equi-populous, Appellants' proffered comparison is utterly meaningless. By treating the San Ardo justice court district (pop. 3,891) as equivalent to a 1968 municipal court district with nearly 40 times the population (146,858), and to the current *countywide* judicial district with over 90 times the population (355,660), Appellants indulge in a flagrant form of statistical distortion. They compare "apples to oranges" or, more accurately, "grapes to watermelons," and it should be abundantly clear that such illogical and misleading numbers games are improper and probative of nothing at all. (Cf. *Ward's Cove Packing Co. v. Atonio*, 490 U.S. 642, 650-655, 109 S.Ct. 2115, 2121-2123 (1989) [attempt to measure discrimination by simple comparison of employment numbers to population, without regard to job distinctions, qualifications, and interest, is "nonsensical"]; and see Huff, "How to Lie With Statistics," (Norton/1993).)³⁵ Thus, such comparisons would provide no credible evidence of retrogression even if the court below were authorized to decide that question.³⁶

no party has suggested that such short-term assignments are made based on the *racial composition of the judges' districts*, in the fashion contemplated under the December 1994 plan. And the State disputes that such temporary assignments may be viewed as diminishing the state interest in having judicial elections determined by all voters in the respective judicial districts.

³⁵ In its earlier rulings, the district court appears to have succumbed somewhat to the superficial appeal of Appellants' empty comparisons. (See, e.g. J.A. 54 [describing consolidation process simply as changing from "ten judicial election districts" to "one judicial election district"].)

³⁶ Using 1990 census data, which, as noted earlier, overstates the relative proportion of Latinos in 1968 (J.S. Apx. 94, ¶ 4), adult Latino citizens formed a majority in three small justice court districts: Gonzales (pop. 7,880); Greenfield (pop. 8,987); and Soledad (pop. 9,465 [excluding prison]). The

The normal legislative requirement of equipopulous electoral districts – a rule necessary for any rational determination whether voting rights are, in fact, equal – does not apply to judicial districts. (*Wells v. Edwards*, 347 F.Supp. 453, 454 (M.D.La. 1972), *aff'd*, 409 U.S. 1095 (1973).) When judicial districts are not equipopulous, however, as was the case in Monterey in 1968, ascertainment of relative voting strengths and/or retrogression is necessarily complex and difficult, if not impossible. Indeed, this case, with its “apples to oranges” judicial districts, precisely illustrates the quandary anticipated by Justice Scalia in *Chisom v. Roemer*, 501 U.S. 380, 415, 111 S.Ct. 2354, 2375 (1991). (See Arg. II C 4, *infra*.)

C. The County's Section 5 Violations Have Not Yet Been Finally Determined to Be Material to Current Countywide Municipal Court Elections

1. Unresolved Mootness Issue

In arguing the need for a radical race-based “remedy” in this case, Appellants repeatedly stress that “a section 5 violation” has been found by the district court. (See, e.g., U.S. Brief at 16; ACLU Brief at 4; Lopez Brief at 18, 46.) But this representation does not tell the whole story, and the missing chapters are critical.

In March 1993, to be sure, the district court determined that the County, as a covered jurisdiction, violated

combined population of these three majority-minority districts (26,332) constituted only 7.53 percent of the total county population (349,664 [excluding prison]), which means that 92.47 percent of the County's residents lived in judicial districts which were *not* majority-minority – even using 1990 census data. (State Apx. 14a; Sillman Apx. 50a.) Furthermore, if the three diminutive majority-minority justice court districts had been consolidated into a single district, the resulting combined population (26,332, using 1990 data) would have fallen far short of the minimum population (40,000) required for creation of a municipal court district. (*Id.*, and see Cal. Const., Art. VI, § 5.)

Section 5 to the extent that it failed to preclear its historic consolidation ordinances between 1972 and 1983.³⁷ The State concedes that such failures, standing alone, would constitute technical violations, assuming *arguendo* that the mere merging or redrawing of unequally populated judicial districts is in fact a “voting change.” (See Arg. II C 4, *infra*.) The question remains, however, whether such violations are at all material to the County's present authority to conduct at-large elections, given the long passage of time before Appellants filed their action and given intervening changes in state law during that period. These factors may well render the historical ordinances *altogether moot* at this point. The district court has not yet addressed these questions; however, the State – which was not made a party defendant until November 1995, has now raised both issues in its answer to the complaint. (State Apx. 28a-29a.) Furthermore, the district court has expressly acknowledged that these mootness issues may ultimately be dispositive of the case:

The State appears to believe there has been no Section 5 violation that affects the County's ability to hold county-wide judicial elections. At this

³⁷ But see U.S. Brief at 15-16, fn. 10 [conceding that County Ordinance No. 2930 was precleared]. See also DOJ's March 6, 1995 letter to Monterey County Counsel, where DOJ notes that, among the “voting changes for the municipal court of Monterey County, California” which were submitted to the Attorney General for preclearance – indeed, the first such submission listed – was: “1. the consolidation of the municipal and justice courts that existed on November 1, 1968, into a single municipal court with nine judgeships.” DOJ then expressly states that “[t]he Attorney General does not interpose any objection to the municipal court consolidation, the interim election plan, the districting plan (as modified), the term of office, the procedures for conducting a June 6 special primary and an August 1 special runoff, and the additional judgeship.” (J.S. Apx. 54; emphasis added.) This DOJ preclearance, too, may render Plaintiffs' action moot, as asserted by the State. (State Apx. 28a-29a); the district court has not yet addressed the question.

point the court is not persuaded by the State's position, but the State [as a newly added defendant] can now seek to show that the County is merely administering a state law calling for county-wide elections and, therefore, no preclearance requirement is involved.

(J.A. 166, fn. 2; emphasis added.) Viewed in this light, Appellants' challenge to the court's countywide election plan is meritless; any other remedial order would be premature.³⁸

2. Unresolved Laches Issue

As Appellants and their *amici* admit, Section 5 of the VRA was intended primarily as a *prophylactic* measure, to prevent implementation of *new* voting changes by a covered jurisdiction – and to *maintain the status quo* – until preclearance has been obtained. (See, e.g., U.S. Brief 10, 12 [Section 5 has “prophylactic purpose”; central purpose of preclearance is to establish “legality of new voting practices before they are implemented”]; and see *Bush*, 64 USLW at 4461.) Here, of course, Appellants rendered this congressionally intended prophylactic use of Section 5 *impossible* by waiting until late 1991 to challenge local ordinances effectuated one to two decades before, between 1972 and 1983. Appellants have offered no

³⁸ Indeed, at this early point in the proceedings, any remedial order is arguably premature. Because no *material* violation of Section 5 has yet been found, any order preventing countywide elections from going forward in 1996 would have been an abuse of discretion. (See *Miller*, at 2488 [federal courts' disruption of election schemes is “serious intrusion onto the most vital of local functions”].) The district court, having introduced a new defendant and having reopened the threshold liability issue, should have lifted its injunction altogether until a material Section 5 violation, if any, is established.

explanation for this inordinate delay,³⁹ the results of which are: a) the ordinances cannot, by a distance of 8 to 20 years, be enjoined “before” implementation; b) a return to the status quo is no longer feasible; and c) as noted in subsection 1, *ante*, subsequent changes in superseding state law have by now rendered moot Appellants' complaint about *ordinances*.

The State initially intervened in this case to assert and protect state interests in the remedial phase (J.A. 126), and was added as a party defendant on November 1, 1995. (J.A. 172-173.) In its recent answer to Appellants' complaint, the State has raised, *inter alia*, the defense of laches (State Appx. 28a) – an issue which the district court has not previously considered and which may prove dispositive.

3. Unresolved Tenth Amendment Issue: Application of Section 5 to Monterey County in the Present Circumstances is an Unwarranted Usurpation of Powers Reserved to the State

Furthermore, neither the district court nor any other tribunal has yet considered the constitutional propriety of Monterey's initial designation as a covered jurisdiction under Section 5. This Court is invited to do so. In *Miller*, this Court suggested that, absent strong evidence of discrimination, Congress' application of Section 5 restrictions and preclearance requirements to the States may

³⁹ The State acknowledges that Plaintiffs' complaint was not filed until after issuance of this Court's opinions in *Houston Lawyers Ass'n v. Texas*, 501 U.S. 419, 111 S.Ct. 2376 (1991) and *Chisom v. Roemer*, 501 U.S. 380, 111 S.Ct. 2354 (1991), clarifying that state judicial elections come within the ambit of the VRA. If prior uncertainty on this question excused Plaintiffs' failure to file their action when the challenged ordinances were promulgated, however, it must also excuse the County's failure to obtain preclearance.

well exceed Congress' power under Section 2 of the Fifteenth Amendment and tread impermissibly upon the powers reserved to the States under the Tenth Amendment. Thus, the Court noted that Section 5 "was directed at preventing a particular set of invidious practices which had the effect of 'undoing or defeating the rights recently won by nonwhite voters.'" (*Miller*, at 2493, quoting H.R.Rep. No. 91-397, p. 8 (1969).) The statute "was a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down." (*Ibid.*, quoting from *Beer v. United States*, 425 U.S. 130, 140 (1976).) The Court observed that, notwithstanding the Tenth Amendment, "[i]n *Katzenbach*, 383 U.S. 301 (1966), we upheld § 5 as a necessary and constitutional response to some states' 'extraordinary stratagems of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees.'" (*See Miller*, at 2493.) In its next sentence, however, the Court indicated that the *interests of federalism* necessarily limit the extent to which Section 5 preclearance requirements may be justified:

But our belief in *Katzenbach* that the federalism costs exacted by § 5 preclearance could be justified by those extraordinary circumstances does not mean they can be justified in the circumstances of this case.

Thus, there is a real question whether the Tenth Amendment prohibits application of Section 5 preclearance requirements where, as here, there is *no predicate evidence of wrongdoing* by the targeted political subdivision.⁴⁰ If application of Section 5 preclearance were deemed unjustified or

⁴⁰ As noted above, Monterey became a Section 5 jurisdiction only because, in 1968, it was subject to a statewide literacy test and its voter turnout for the presidential election was fewer than 50% of the County's voting age residents. No correlation was made between voter turnout and race, however,

doubtful in *Miller*, where there was a history of past discrimination in congressional districting (*Id.*, at 2483, and see *City of Rome v. United States*, 446 U.S. 156, 173-183 (1980).) then its application is certainly inappropriate, *a fortiori*, in the instant case, where there is neither discrimination nor retrogression.⁴¹ Determinations of the "structure of government and

and it is quite unlikely, that the test and the turnout were causally linked. California's literacy test was applicable throughout the State, yet only two of California's 58 counties were deemed "covered" as a result of the 1970 amendments to the Voting Rights Act: Monterey County and Yuba County. 36 Fed.Reg. (No. 60) 5809 (March 27, 1971). Hispanics constituted a significant percentage of the population in many other California counties: according to 1990 census figures, for example, Hispanics make up 26.6 percent of the population of Santa Barbara County; 33.3 percent of Colusa County; 33.6 percent of Monterey (but only 17 percent of Monterey's *voting age citizens* [State Apx. 14a, 15a]); 34.5 percent of Madera County; 37.8 percent of Los Angeles County; 45.8% of San Benito County; and 65.8 percent of Imperial County. (*California Statistical Abstract 1995* [Cal. Dept. of Finance], p. 19, Table B-5.) This would suggest that factors other than racial or ethnic discrimination (e.g., military bases, prisons, alienage, migratory patterns, etc.) may have accounted for calculation of a "low voter turnout" in Monterey. (*Cf.*, *Apache County v. United States*, 256 F.Supp. 903, 909-910 (D.C.D.C. 1966)) – particularly since military bases and prisons accounted for more than one-sixth of the County's population at the time. (*See County's Response to Appl. for Stay*, at p. 2 and fn. 2; *see also* D.E. 30, Ex. A, p. 58 [17% of County's 1970 population resided on military bases].)

⁴¹ Appellants miss the point in arguing that the United States' findings as to voter turnout and "device or test" may not be challenged in a Section 5 proceeding. (*See Appellants' Reply to State Motion to Dismiss*, 5-6; and see *Briscoe v. Bell*, 432 U.S. 404, 97 S.Ct. 2428 (1977).) The State does not propose to dispute the *accuracy* of these federal findings, but rather their *sufficiency*. The State challenges whether, under the Tenth Amendment and in light of this Court's comments in *Miller*, such findings are sufficient, standing alone, to warrant federal usurpation of the sovereignty of the State or its political subdivisions. This

the character of those who exercise government authority," – such as the organization and reach of municipal and justice courts here – are, quintessentially, the prerogative of "the citizens of a sovereign State," protected by the Tenth Amendment. (*Gregory v. Ashcroft*, 501 U.S. 452, 460, 473 (1991); and see *New York v. United States*, 505 U.S. 144 (1992).) Section 5 should not be read or applied so expansively that it usurps this sovereign prerogative – particularly in the absence of discriminatory wrongdoing by the covered jurisdiction. (*Miller*, at 2493; *Katzenbach*, 383 U.S. at 326; and see *id.* at 358-360 [Black, J., concurring in part and dissenting in part].) Even if initial application of preclearance requirements to the County did not offend the Tenth Amendment, the imposition of a race-based "remedial order" – particularly an election plan violative of state law – would do so in the absence of Fifteenth Amendment predicate interests.⁴²

constitutional question may be raised in any proceeding. (See *Miller*, 115 S.Ct. at 2493 [Tenth Amendment may preclude application of Section 5 absent extraordinary circumstances present in *Katzenbach*].) In the circumstances of the present case, the State submits that the answer to this question must be a resounding "No." (Cf. *Seminole Tribe v. Florida*, ___ U.S. ___, 116 S.Ct. 1114 (1996).)

⁴² Appellants and DOJ have elsewhere asserted the extreme and unsupported proposition that a sovereign *State*, though not itself a Section 5 covered jurisdiction, must nevertheless submit its newly enacted *state laws* to DOJ for preclearance to the extent they may affect election matters within a covered political subdivision such as Monterey. (See, e.g., Appellants' Reply to State Motion at 5.) But such an expansive and unwarranted application of the VRA to, essentially, extend a *rebuttable presumption of discriminatory purpose and/or effect* to uncovered state governments – whose laws must otherwise be *presumed to be valid* – would clearly violate the Tenth Amendment.

4. Unresolved Question Whether Court Consolidation Altered a Voting "Standard, Practice, or Procedure" Subject to Section 5 Preclearance

Finally, the State, as a new defendant, contends that the mere merging of several scattered and costly, independent, part-time justice court districts, and their gradual consolidation with larger existing courts of record, is not a "qualification, standard, practice, or procedure" within the meaning of Section 5 of the VRA. *There was no change in the manner in which judges are elected to a court: that system – with each qualified voter in a judicial district having a vote for each vacant judgeship – has remained the same between 1968 and the present (except for the December 1994 race-based "division" plan). Rather, this was a transformation and upgrading of the court itself – its nature, qualifications, jurisdictional scope, and administration – as part of a statewide, race-neutral drive to improve judicial quality and efficiency while reducing costs. This transformation did not involve equipopulous legislative districts, but trial court districts with vastly different populations ranging from 3,891 in San Ardo to 146,858 in Salinas. (State Apx. 14a.)*

Because the County's 1968 judicial districts were not equipopulous, the *true* relative voting strength of Hispanic and non-Hispanic voters within the county cannot be established. Without such a norm by which to measure what Latino voting strength *was or should have been* in 1968, as compared with Monterey's non-Hispanics, a *change in district lines, standing alone*, cannot be said to affect the "equality of voting rights" guaranteed by the VRA.⁴³ This analytical quandary has previously been the subject of discussion on the Court: When the "baseline" judicial districts are not even close to equipopulous,

⁴³ This problem is compounded here because the 1968 system also involved two distinct *kinds* of courts: justice courts and municipal courts.

"[h]ow does one begin to decide . . . how much elective strength a minority bloc *ought* to have?" (*Chisom*, 501 U.S. at 415, 111 S.Ct. at 2375 (1991) (Scalia, J., dissenting; italics in original).) The VRA guarantees *equal* voting opportunities, without regard to race or ethnicity, yet "equality" is not susceptible of reasonable measure where districts are not equipopulous. (See "apples to oranges" discussion, *ante*.) The State submits, therefore, that the same valid factors which necessarily exempt judicial districts from requirements of equal population (*see Wells*, 347 F.Supp. 453, 454 (M.D. La. 1972), *aff'd*, 409 U.S. 1095 (1973).) must, necessarily, also exempt consolidations of judicial districts from VRA coverage as "voting practices."⁴⁴

III. THE DISCRIMINATORY, RACE-BASED "REMEDY" ADVOCATED BY APPELLANTS IS PLAINLY UNCONSTITUTIONAL

Appellants argue that the district court overreacted to *Miller*, perceiving non-existent Fourteenth Amendment problems in the December 1994 emergency election order and giving undue credence to admissions by the County. They further assert that the race-based election divisions employed therein should pass constitutional muster because they were "narrowly tailored" to serve "a compelling state interest." These contentions are utterly meritless and disingenuous. If anything, the district court's challenged November 1995 order *understated* the glaring constitutional shortcomings evident in that 1994 election order.

⁴⁴ On April 1, 1993, the district court concluded that the disputed ordinances "constitute a change in voting procedure different from that in force or effect on November 1, 1968." (J.A. 54.) In reaching that conclusion, however, the court did not consider the points here discussed, and the State, not then a party, has not yet had the opportunity to present its concerns and defenses on the subject.

A. Defendant County Admitted That Race Was The Exclusive or Predominant Consideration in Fashioning the "Election Divisions" Employed by the Court

As recounted in the Procedural Facts, *ante*, the district court directed the parties to "brief the effect of [Miller] on this case", indicating that this issue would be addressed at the scheduled September 28, 1995 status conference. (J.A. 163.) The resulting briefing focussed, to a great extent, on whether this Court's *Miller* opinion revealed flaws in the four-division election plan which had been approved by the County, proffered to the court, and used by the court to fashion its December 1994 emergency election order. (*See* D.E. Nos. 151-156.)

At the September 28 hearing, most of the comments by the court and the parties similarly addressed the question whether the December 1994 plan could withstand scrutiny in the light of *Miller*. Plaintiffs, Defendant County, and the Intervenor were all present, by and through their respective counsel, to argue their positions and to respond to questions from the court or other parties. Douglas Holland, Monterey County Counsel, was the County's representative. (D.E. No. 161, p. 2, and *see* p. 31 [Judge Whyte referring to Holland as "the County"].) In response to a specific question from Judge Whyte regarding whether and how *Miller* applied to the 1994 plan,⁴⁵ Holland admitted that the "electoral divisions"

⁴⁵ The County's admission was preceded by the following exchange:

JUDGE WHYTE: Do you feel the *Miller v. Johnson* case raises some questions about the constitutionality of the plan that was approved as an interim emergency plan?

MR. HOLLAND: No, I do not, Your Honor.

JUDGE WHYTE: And the reason?

(State App. 13a.) The ACLU's portrayal of the County's admission as an "off-the-cuff description" which was "taken out of context" (ACLU Brief at 15) is thus starkly inaccurate.

were configured largely, if not exclusively, on the basis of race:

I will be the first one to admit the reasons for [-] the rationale for [-] the boundaries were in fact race generated. There's no question about it. That was the sole motivation. Nothing else went into those considerations. To the extent any other factor went in, it was entirely secondary. There's no question about that.

(State Appx. 13a; emphasis added.) With this explanation, the County answered affirmatively the threshold question posed in *Miller*: namely, whether, in crafting election districts, traditional race-neutral principles were subordinated to racial considerations. (*Id.* at 2490.) Accordingly, the plan cannot be upheld "unless it satisfies strict scrutiny, our most rigorous and exacting standard of constitutional review." (*Ibid.* And see *Shaw II*, *Bush*.)⁴⁶ Immediately after the foregoing admission, the County proceeded with the remainder of its *Miller* analysis, arguing that the 1994 plan was narrowly tailored to a compelling interest: "But I think that it was also necessary in order to resolve a

⁴⁶ Appellants cite this Court's summary affirmance of *DeWitt v. Wilson*, 856 F.Supp. 1409 (E.D.Cal. 1994), *aff'd in relevant part and dismissed in part*, 115 S.Ct. 2637 (1995) for the proposition that race may be a significant factor in districting without triggering strict scrutiny of the plan. (Lopez Brief 31-32; and see ACLU Brief 14-15.) But their reliance is misplaced; the reasoning of the district court may not be attributed to the Supreme Court in this fashion: "I note that our summary affirmance in *DeWitt* stands for no proposition other than that the districts reviewed there were constitutional. We do not endorse the reasoning of the district court when we order summary affirmance of the judgment." (*Bush*, 64 USLW at 4465 [Kennedy, J., concurring]; and see *Id.* at 4466-4467 [Thomas, J., concurring].) In any event, here race plainly played a far stronger, more predominant role than it did in *DeWitt*; here, "electoral divisions" would not have been contemplated at all but for the factor of race.

particular problem that we were in at that time." (State Appx. 13a.)

Appellants and their *amici* struggle to downplay the significance of the Defendant County's concession in this regard.⁴⁷ But Mr. Holland was not in the courtroom at this *Miller* hearing to give his personal views; nor had he been pulled from the sidewalk at random for a "man-on-the-street" interview. Rather, he addressed the court in his role as the spokesman and legal representative of the Defendant County - the legislative body which had approved the proposed election divisions. Hence, his was the County's admission as to the basis for those divisions. (*Cf. Miller*, at 2489 [citing Georgia's concessions that normal districting standards were disregarded]; *Shaw II*, at 4439 [crediting North Carolina's concession that districts were deliberately created to assure black-voter majorities].) It is also significant that *Plaintiffs have never contradicted or challenged the County's characterization or admission.* (See D.E. No. 161, pp. 20-31, 55-56.)⁴⁸

Furthermore, the County's admission was consistent with other evidence presented to the three-judge court showing subordination of traditional governing principles, including both testimony about purpose and tinkering for effect.⁴⁹ One clear and rather extraordinary

⁴⁷ (See, e.g., ACLU Brief at 7 ["an off-hand remark of a County attorney"] and 15 [an "off-the-cuff description" which was "taken out of context"]; U.S. Brief at 9 ["[a] county attorney expressed the view . . . that the electoral districts . . . were drawn on the basis of race"]; Appellants' Brief at 31 ["County Counsel's statement at a status conference"].)

⁴⁸ Plaintiffs' only rebuttal is that they could have shown that the divisions were "compact." (Lopez Brief, p. 30 at 22.) This claim, even if true, is irrelevant if, as here, race was the *primary* consideration. (*Shaw II*, at 4441.)

⁴⁹ The court was informed of testimony from Ernesto Gonzalez concerning Monterey's *supervisory* district 1, upon which the December 1994 judicial Electoral Division 1 was

indication that conventional districting principles were abandoned is the fact that it was not the County, but the *five Latino plaintiffs*, who prepared this "plan" and who dictated the configurations of two electoral divisions having Latino majorities of their adult citizen populations. This fact (overlooked in the briefs supporting appellants) is set forth in the County's December 29, 1994 letter to DOJ seeking preclearance of the court's December 1994 plan:

We should point out that *the basic plan as adopted by the Board was originally prepared by [plaintiffs' attorney Joaquin] Avila on behalf of the plaintiffs. The boundaries of the Court Divisions 1 and 2 were entirely prepared at Mr. Avila's direction.*

(J.S. Apx. 36; emphasis added. *And see* J.S. Apx. 51, ¶ 1.2.2 [County may make minor adjustments to division boundary lines only "after consultation with legal counsel for the *Lopez Plaintiffs*"].) This Court may readily infer that Monterey's delegation – or abdication – of redistricting responsibilities in favor of a single special interest group of minority plaintiffs in this manner is inconsistent with customary government principles and practices.⁵⁰

largely modeled. Gonzalez, who was involved in designing supervisorial district 1, admitted that the district boundaries were chosen to *maximize* "the percentage of Hispanics in a district." (D.E. No. 154 at 7-8 and Ex. N, pp. 1662-1663.) In addition, Electoral Division 1 was modified – after the court's December 1994 order but before the election – to transfer a predominantly non-Hispanic census tract into Division 4. (*Ibid.*, and at Ex. N, pp. 1678-1681; Ex. E [map showing area as adjusted]; Ex. B [division map filed with the court]. *And see* D.E. No. 53 (Plaintiffs' Memo Supporting Second Stipulation) at pp. 11-12 [as condition of preclearance, DOJ would require that Electoral Division 1 divide City of Salinas and have Hispanic population above 64 percent].)

⁵⁰ Further corroborating evidence of the discriminatory intent driving the plan may be found in its provision that, in allocating judicial positions among the four race-based

Also telling is the fact that, geographically, the resulting 1994 majority-minority "electoral divisions" did not even pretend to coincide with, or even to approximate, the majority-minority justice court districts which existed in 1968 – the elimination of which is the claimed source of retrogression. (*See* Sillman Apx. 49a, 51a.) And the *demographics* of the December 1994 plan, taken alone, further support the court's finding. Divisions 1 and 2 are each 69% Latino (voting age), while Division 4 is only 16% Latino. (State Apx. 15a; Sillman Apx. 52a.)

B. Appellants Entirely Ignore the 1994 Plan's Grossly Prejudicial Effects, Which Provide Further Evidence of Discrimination and Subordination

The predominant role of race-based discrimination in formulating the December 1994 plan is also glaringly evident from the plan's discriminatory *effects*. (*See Bush*, 64 USLW at 4456 [actual election results may provide "inferential support" for finding of intent].) Putting aside the fact that no retrogression has yet been identified or quantified, the "electoral divisions" adopted by the County and jointly proffered to the court in the Parties' Second Stipulation were entirely unrelated to any restoration of the 1968 pre-consolidation situation – in which a Latino majority-minority voting status existed in, at most, only three small independent justice court districts constituting but 7.5% of the County's total population, and in which the elected part-time judges presided only over their respective districts. Instead, the December 1994 plan resulted in three large majority-minority "divisions," constituting 27.5% of the County's total population. These new divisions have an *average* population (31,957) that exceeds the *total* population of the three 1968 majority-

"divisions," *vacancies* must first be allocated to "each division in which a racial or ethnic minority comprises at least a majority of the population in such division." (Sillman Apx. 17a, ¶ 4.)

minority districts (26,332), using 1990 data for both. More than that, the judges elected from these discrete race-based 1994 divisions are permitted to sit on a *countywide* court presiding over 100 percent of the County's population, notwithstanding that approximately 90% of the County's adult residents are denied any opportunity to vote in their respective elections. (State Apx. 14a, 15a.)

Further, as noted above, there is *no geographical similarity* between a) the December 1994 majority-minority "divisions" – whose very *raison d'être* is racial stereotyping – and b) the three small, rural, independent justice court districts which happened to be majority-minority in 1968. (Compare Sillman Apx. 49a, 51a.) As this Court clearly held in *Shaw II*, at 4442-4443, such an absence of geographical correspondence between prior identified "discriminatory areas" and "remedial districts" violates the Fourteenth Amendment.

—By any measure, the radical changes effected by the December 1994 plan appear to be designed, like the plans rejected in *Miller* and *Shaw II*, to *arbitrarily and impermissibly maximize* the voting power of Latinos at the expense of other citizens rather than to restore the 1968 status quo. Such discrimination against non-Latinos within the County would be devoid of justification *even if* there had been a finding by the district court for the District of Columbia that intervening ordinances were somehow retrogressive. Any such remedies, to be constitutional, must be custom fitted, both numerically and geographically, to address a clearly identified harm: "Nonretrogression is not a license for the State to do whatever it deems necessary to insure continued electoral success; it merely mandates that the minority's opportunity to elect representatives of its choice not be diminished, directly or indirectly, by the State's actions." (*Bush*, 64 USLW at 4461; and see *Shaw II*, 64 USLW at 4442, quoted *ante*.) Appellants' and DOJ's efforts here to exponentially increase minority voting strength in municipal court elections, without regard to status quo or harm, go far beyond the very limited goal of Section 5 "to insure that no voting-

procedure changes would be made that would lead to a retrogression in the position of racial minorities." (*Bush*, at 4461 [quoting *Miller* at 2493, quoting *Beer*, 425 U.S. at 141, 96 S.Ct. at 1363].)⁵¹

This statistical evidence of the plan's discriminatory effects was before the district court (see State Apx. 20a-21a at fn. 3; and see D.E. No. 161 at 35-39), and it powerfully supports the court's November 1995 order. Appellants make no mention of it whatsoever in their brief, however, and DOJ and the ACLU are similarly unwilling to confront these facts. Instead, all three shout from hiding that the 1994 plan is "narrowly tailored" to serve a "compelling interest."

C. The Race-Based Plan Patently Disregards Normal Principles Applicable to California Municipal Courts

As the district court itself noted, its December 1994 emergency election plan "suspended otherwise applicable provisions of state law". Specifically, the plan: a) "included districts that split the City of Salinas," in contravention of Article VI, Section 5 of the California Constitution; and b) provided that "a judge's jurisdictional and electoral bases [were not] coterminous," in contravention of Article VI, Section 16(b). (J.A. 131-132.) In addition, the plan created electoral districts having populations less than the 40,000 minimum population for municipal court districts (see State Apx. 15a; Cal. Const., Art. VI, § 5), and it did not require judicial candidates to be residents of the electoral division in which they stood

⁵¹ As in *Miller*, *Shaw II*, and *Bush*, the fact that DOJ willingly precleared the race-based plan in this case (J.S. Apx. 53-55) is reflective not of the plan's legitimacy, but of DOJ's distorted and abusive application of the VRA. "It takes a short-sighted and unauthorized view of the Voting Rights Act to invoke that statute, which has played a decisive role in redressing some of our worst forms of discrimination, to demand the very racial stereotyping the Fourteenth Amendment forbids." (*Miller* at 2494; See also *Shaw II*, at 4441.)

for election. (Sillman Apx. 18a, ¶ 7; Cal. Gov. Code § 71140. And see J.A. 60-68.) And, of course, the plan was designed by Plaintiffs rather than by county officials.

D. The Plan Serves No Compelling Purpose and is Not "Narrowly Tailored"

As discussed above, there is no finding of retrogression or discrimination in this case. There is only a technical failure of the County to preclear some of its historical ordinances between 1972 and 1983, but even that failure may yet be determined to be moot. Absent a clear finding of *identified, quantifiable* retrogression, there is no way to calculate the "amount" of remedy required, in any *newly devised* plan, to "right the (unidentified) wrong." (See *Bush*, at 4461 [problem that State seeks to remedy must be "specific, 'identified discrimination'"]; *Shaw II*, at 4442.)⁵² In any event, the particular "remedy" endorsed by Appellants and their supporting *amici* here – the race-based December 1994 plan

⁵² Monterey apparently abandoned the defense of its consolidation ordinances in hopes of minimizing further litigation and containing its attorney fee liability. (D.E. No. 161 at 19-20; Apx. 1a-3a.) However, this goal cannot excuse or justify the County's failure to seek preclearance or to defend the Fourteenth Amendment rights of non-Latinos against DOJ's unwarranted demands:

The dissent contends next that an 'acceptable reason for creating a second majority-minority district' was the 'State's interest in avoiding the litigation that would have been necessary to overcome the Attorney General's objection' under § 5 . . . If this were true, however, *Miller v. Johnson* would have been wrongly decided because there the Court rejected the contention that complying with the Justice Department's preclearance objection could be a compelling interest. *Miller, supra*, at ____ (slip op., at 20-21). It necessarily follows that avoiding the litigation required to overcome the Department's objection could not be a compelling interest.

(*Shaw II*, at 4440, fn. 4; emphasis added.)

imposing unprecedented "electoral divisions" – bears no relationship whatsoever to the plan in effect in 1968, and is anything but "narrowly tailored."

E. The Unconstitutional and Unenforceable December 1994 Plan Cannot Be A Voting Rights "Benchmark"

Appellants argue that the previous one-time emergency December 1994 race-based interim election order, with court-shortened terms, must be treated as the retrogression "benchmark" because it has been precleared by DOJ. This argument is absurd. For the reasons discussed above, and in light of this Court's decisions in *Miller*, *Shaw II*, and *Bush*, that December 1994 plan is patently unconstitutional. It could no more serve as a "Section 5 benchmark" than could the racially gerrymandered congressional districts in *Miller* and *Shaw II* which so offended the Fourteenth Amendment.⁵³

⁵³ Furthermore, the district court made it abundantly clear even in its December 1994 order that this interim election plan was to have no precedential effect upon future remedies – legislative or judicial. The court had *rejected* the Second Stipulation when it was offered as a legislative plan (J.A. 91), it expressly left open the possibility that a countywide plan might ultimately be deemed best (J.A. 132), it refused to "pass judgment on the merits of the proposed election area plan" (J.A. 136 at fn. 8), it specified extremely short terms for those elected under the plan, and it encouraged the County, in light of *Miller*, to submit its consolidation ordinances to DOJ for preclearance (D.E. No. 161 at 14). Thus, the court plainly had serious reservations about the propriety of this race-based plan even before this Court issued its *Miller* opinion, and the emergency "remedy" shares none of the attributes of the "benchmarks" found in appellants' cases. (See, e.g., *State of Texas v. United States*, 785 F.Supp. 201 (D.D.C. 1992) [ongoing state legislative redistricting plan carefully fashioned by court and specifically deemed to be "valid and equitable"]; *State of Mississippi v. Smith*, 541 F.Supp. 1329 (D.D.C. 1982) [reapportionment plan that court

The three-judge court's November 1995 ordering of a one-time countywide election for the consolidated municipal court was a proper exercise of the court's equitable discretion, consistent with applicable constitutional principles: a) the court's plan doesn't categorize voters by race or otherwise discriminate; b) there has been no claim that configuration of the County's boundaries violates the VRA or is unconstitutional; c) the district-wide election conforms with the State's Constitution and statutes, which are, to date, unchallenged in this case; d) the order preserves the vital impartiality of judicial offices; and e) the parties have stipulated that they are unable to propose any other plan which satisfies both state law and their view of the VRA. (Sillman Apx. 5a, 13a.)

Appellants assert various additional arguments against the court's November 1995 order, but none is persuasive. They argue that the better course was to extend the interim terms of the December 1994 plan, which is anomalous given that plan's unconstitutionality.⁵⁴ Appellants claim that the consolidated court fails accurately to reflect current minority voting strength, yet they propose giving 27% of the voting power to 17% of the qualified voting-age population. Retrogression is the Section 5 standard; proportionality, even in Section 2 cases, is not the standard for fairness (42 U.S.C. § 1973(b)), and maximization has been rejected by this Court.

was confident had been necessary and valid for state compliance with VRA, and plan had been imposed by court for indefinite duration]; *State of Mississippi v. United States*, 490 F.Supp. 569 (D.D.C. 1979) [reapportionment plan which court and parties had developed, through long, painstaking process, and which court adopted per instructions from Supreme Court]. *McDaniel v. Sanchez*, 452 U.S. 130, 149 (1981), ["redistricting [which] is ordered by a federal court to remedy a constitutional violation that has been established in pending federal litigation"].)

⁵⁴ Appellants' citation to *Brooks v. State Bd of Elections*, 790 F. Supp 1156 (S.D.Ga. 1990) is misguided; the judicial circuits and judicial offices there were not challenged as unconstitutional.

(*Miller, Shaw II, Johnson v. DeGrandy*, ___ U.S. ___, 114 S.Ct. 2647 (1994).) Appellants claim that this Court has stated a preference for "single member districts," but the Court has never stated such a preference in the context of judicial elections. And Appellants' claim that the district court was required to undertake a Section 2 analysis makes no sense: first, nobody has challenged the consolidated municipal court as violative of Section 2; and second, Section 2 analyses are not required in Section 5 cases. (*Bossier*, 907 F.Supp. 434, 445.)

IV. THE EXTREME CIRCUMSTANCES HERE WOULD JUSTIFY A THREE-JUDGE COURT'S REFUSAL TO ACT IN ANY EVENT

Appellants mischaracterize the district court's well reasoned November 1, 1995 injunctive order as a "refusal to enjoin unprecleared changes." (See Arg. I, *ante*.) Even if that characterization were accurate, however, affirmance would nevertheless be required in the unique circumstances of this case. In *Clark v. Roemer*, 500 U.S. 646, 654, 111 S.Ct. 2096, 2102 (1991), this Court declined to decide "... whether there are cases in which a District Court may deny a § 5 plaintiff's motion for injunction and allow an election for an unprecleared seat to go forward." The Court did suggest, though, that it would be appropriate to permit implementation of such an unprecleared election change in "extreme circumstances." (*Ibid.*) The State submits that the exceptional and extreme conditions presented here would warrant such judicial inaction, regardless of how narrowly the Court may wish to define "extreme circumstances."

Conditions here include: (1) Plaintiffs' protracted, unexplained delay in bringing their Section 5 action;⁵⁵ (2) the

⁵⁵ Courts may consider the undue passage of time as a factor in determining an appropriate temporary remedy. *Lopez v. Hale County, Texas*, 797 F.Supp. 547, 550-551 (N.D.Tex. 1992), *aff'd*, 113 S.Ct. 954 (1993).

absence of ascertainable or quantifiable harm; (3) the stipulated lack of discriminatory purpose underlying the historical consolidation ordinances; (4) the interlocutory, one-time nature of the injunctive order from which the appeal is taken; (5) the fact that "[a] return to the status quo that existed before the enactment of the consolidation ordinances is not legal, feasible, or desired." (J.S. Apx. 3; and see J.A. 129 and fn. 3); (6) the fact that Section 5 may have no application here because, in conducting its current judicial elections, the County may be administering state statutes and constitutional provisions rather than county ordinances; (7) the fact that the State has newly been added as a defendant and is free to raise new, potentially dispositive defenses on the merits of Appellants' claim; (8) the fact that Appellants have not challenged the configuration of Monterey County;⁵⁶ (9) the fact that the historical consolidation ordinances have never been determined to be retrogressive and that, because of extreme disparities in the 1968 districts' populations, such an analysis would be difficult if not impossible; (10) the possibility that the County's challenged ordinances may already have been precleared in March 1995; (11) the fact that the County became a covered jurisdiction through mechanical application of a statutory formula, with no finding of past discrimination; and (12) the fact that the previous race-based December 1994 plan is manifestly unconstitutional under *Miller*, *Shaw II*, and *Bush*. (See Arg. III, ante.)

⁵⁶ As the district court observed in its November 1, 1995 order, municipal court judges *serve the entire county* (unlike the justice court and municipal court judges who, in 1968, were elected from smaller districts within the County but also sat only in those smaller districts), "and no claim is made that the County itself was configured to deprive any racial or ethnic group of voting power." (J.S. Apx. 6.) Furthermore, the California Constitution, Article VI, Section 16(b), reflects a state interest in having its judges' jurisdictional and electoral bases be coterminous. (See also *League of United Latin American Citizens v. Clements*, 999 F.2d 831, 872 n. 33 and accompanying text (5th Cir. 1993), cert. denied, 114 S.Ct. 878 (1993).)

V. IN WEIGHING SECTION 5 REMEDIES, COURTS MUST DISTINGUISH BETWEEN LEGISLATIVE AND JUDICIAL OFFICES

This case presents an issue not addressed by the Court in *Miller*, *Shaw II*, and *Bush*, which concerned race-based congressional districting: namely, whether Section 5 should be applied in the same manner to *judicial elections* as it is to elections of *legislative representatives*. It should not.

In the performance of their vital public function, judges are and must be governed by distinctly different principles than those guiding elected legislators. Judges do not "represent" the needs and interests of a particular constituency, but are called upon to weigh evidence and apply the law impartially and objectively in every case, without regard to the parties' race or residence or "electoral division." Their duty is to the entire community, and they should remain accountable to the entire community. A trial judge's decisions are not rendered through the majority vote of a board or commission or committee composed of partisans; rather, they are made by the judge alone, independently, acting in the interest of all. (See *League of United Latin American Citizens v. Clements*, 999 F.2d 831, 872 n. 33 and accompanying text (5th Cir. 1993), cert. denied, 114 S.Ct. 878 (1993); *Wells*, 347 F.Supp. 453, 454 (M.D.La. 1972), aff'd, 409 U.S. 1095 (1973).)

The subdivision of Monterey's municipal court into race-based electoral enclaves, as advocated by Appellants and by DOJ, ignores these fundamental distinctions between judges and legislators and undermines the integrity, respect, and independence so vital to the State's judicial system. Even in the context of legislative districting, this Court has pointed out that the objective of eradicating invidious discrimination "... is neither assured nor well served ... by carving electorates into racial blocs." (*Miller* at 2494.) That admonition applies even more strongly here, in the context of judicial elections.⁵⁷ Courts are not legislatures, and this

⁵⁷ Courts have recognized limitations on their authority to, in essence, redesign the system or form of state government as a remedy for Section 2 violations: "[f]ederal courts may

Court is urged to clarify whether and to what extent Section 5 constitutionally may be used by Plaintiffs and DOJ to obliterate the distinctions between these two branches of government.

CONCLUSION

For the reasons stated herein, this Court is respectfully urged to affirm the November 1, 1995 interlocutory injunctive order of the district court.

Dated: July 3, 1996

Respectfully submitted,

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not . . . alter the state's form of government itself when they cannot identify 'a principled reason why one [alternative to the model being challenged] should be picked over another as a benchmark for comparison.' " (*Nipper v. Smith, supra*, 39 F.3d at 1532, citing *Holder v. Hall*, 512 U.S. ___, 114 S.Ct. 2581, 2586 (1994).) Courts should exercise even more restraint when only a Section 5 violation is at stake, and still more when the challenged elections concern judicial rather than legislative positions.

INDEX TO APPENDIX TO BRIEF ON ITS MERITS

Page

Memorandum of Agreement 1a

MEMORANDUM OF AGREEMENT

The Plaintiffs in *Vicky M. Lopez, et al., v. Monterey County, California*, Civ. Act. No. C-91-20559 WAI (EAI), the Defendants-Intervenors in *Monterey County v. United States of America*, Civ. No. 93-1639 (CRR) and Monterey County, California, to resolve any issues with respect to the award of attorneys fees, litigation expenses, and court costs, hereby stipulate to the following:

1. Monterey County shall pay to the order of Joaquin G. Avila, Esq., in full and complete discharge of all obligations to pay attorneys fees, expenses, and court costs incurred by or on behalf of the *Lopez* Plaintiffs and the *Lopez* Defendants-Intervenors, the sum of Two Hundred and Fifty Thousand Dollars (\$ 250,000.00), subject to the following conditions:
 - a. Monterey County and the Plaintiffs in the *Lopez* case and Defendants-Intervenors in the *Monterey County* case agree to the implementation of an election area plan consisting of at least seven election areas ("election area plan") for the election of Judges to the Monterey County Municipal Court District. The agreed upon election area plan shall be the operative plan for the election of municipal court judges as scheduled for 1994. This plan shall remain in effect at least through December 31, 1994.
 - b. Upon the issuance of the Order described in paragraph c below, Monterey County will proceed to secure approval pursuant to Section 5 of the Voting Rights Act, of the election area plan, approved by the Plaintiffs and Defendants-Intervenors, for electing Judges

to the Monterey County Municipal Court District. Should Monterey County pursue a different remedy for electing Judges to the Monterey County Municipal Court District, other than an agreed upon election area plan for use in the 1994 municipal court elections, the attorneys representing the Plaintiffs in the *Lopez* case and the Defendants-Intervenors in the *Monterey County* case shall have the right to seek additional attorneys fees, expenses, costs, and court costs, for work incurred in successfully opposing the remedy sought to be implemented by Monterey County and for work incurred in successfully implementing an election area plan which meets the requirements of the Voting Rights Act.

- c. Joaquin G. Avila, lead attorney for the Plaintiffs and Defendants-Intervenors, will assist Monterey County in securing approval of an agreed upon election area plan before the United States District Court for the Northern District of California in the *Lopez* case. Part of this assistance before the federal court in the *Lopez* case will consist of the preparation of a proposed stipulated Order and a Memorandum of Points and Authorities in support of the implementation of an election area plan for electing Judges to the Monterey County Municipal Court District. In addition, Mr. Avila will assist Monterey County in securing approval of an agreed upon election area plan either before the United States District Court for the District of Columbia or before the United States Attorney General pursuant to Section 5 of the Voting Rights Act.

2. Nothing in this Agreement shall be construed as prohibiting the County from considering and/or adopting any election area plan for the Municipal Court which would become effective on or after January 1, 1995, so long as such plan complies with the Voting Rights Act and is precleared in accordance with Section 5 of the Voting Rights Act.

IT IS SO AGREED

DATED: Oct. 4, 1993

/s/ Joaquin G. Avila
JOAQUIN G. AVILA
Attorney for *Lopez*
Plaintiffs and
Defendants-Intervenors

DATED: Oct. 5, 1993

/s/ Douglas C. Holland
DOUGLAS C.
HOLLAND
Attorney for Monterey
County

(12)

No. 95-1201

Supreme Court, U. S.

F I L E D

AUG 5 1996

CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

VICKY M. LOPEZ, CRESCENCIO PADILLA,
WILLIAM A. MELENDEZ, and DAVID SERENA, *Appellants*,

v.

MONTEREY COUNTY, CALIFORNIA,
STATE OF CALIFORNIA, *Appellees*,

and

STEPHEN A. SILLMAN, *Intervenor-Appellee*

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

REPLY BRIEF FOR APPELLANTS

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
ARGUMENT	1
I. THE DISTRICT COURT'S ORDER VIOLATED THE SECTION 5 PRECLEARANCE PROVISIONS	2
II. IT IS UNCONTESTED THAT THE DISTRICT COURT HAD ALTERNATIVES TO THE UNPRECLEARED COUNTYWIDE PLAN	6
III. THE COUNTYWIDE METHOD OF ELECTION INCORPORATED IN THE NOVEMBER 1, 1995, ORDER VIOLATES THE STANDARDS FOR COURT-ORDERED PLANS	7
IV. THE CONSTITUTIONALITY OF THE JUNE 6, 1995, ELECTION PLAN IS NOT PROPERLY BEFORE THIS COURT	12
V. THERE ARE NO TENTH AMENDMENT ISSUES JUSTIFYING AFFIRMANCE OF THE DISTRICT COURT'S ORDER	16
CONCLUSION	18

TABLE OF AUTHORITIES

Cases

<i>Allen v. State Bd. of Elections</i> , 393 U.S. 544 (1969)	2
<i>Bush v. Vera</i> , __ U.S. __, 64 U.S.L.W. 4452 (June 13, 1996)	13, 14, 15, 16
<i>City of Port Arthur v. United States</i> , 459 U.S. 159 (1982)	10, 12, 15
<i>City of Rome v. United States</i> , 446 U.S. 156 (1980)	11, 16, 17
<i>Clark v. Roemer</i> , 500 U.S. 646 (1991)	3, 4, 6
<i>Dewitt v. Wilson</i> , 856 F.Supp. 1409 (E.D.Cal. 1994), <i>aff'd in relevant part and dismissed in part</i> , 115 S.Ct. 2637 (1995)	15
<i>Dotson v. City of Indianola</i> , 514 F.Supp. 397 (N.D.Miss. 1981), <i>aff'd</i> , 456 U.S. 1002 (1982)	6
<i>McDaniel v. Sanchez</i> , 452 U.S. 130 (1981)	3, 4, 7, 9, 14
<i>Miller v. Johnson</i> , 115 S.Ct. 2475 (1995)	13, 14, 16, 17, 18
<i>Perkins v. Matthews</i> , 400 U.S. 379 (1971)	10
<i>Presley v. Etowah County Comm'n</i> , 502 U.S. 491 (1992) . .	11
<i>Shaw v. Hunt</i> , __ U.S. __, 64 U.S.L.W. 4437 (June 13, 1996)	13, 14

Table of Authorities Cases Cont'd

<i>Shaw v. Reno</i> , 509 U.S. 630 (1993)	14, 15
<i>South Carolina v. Katzenbach</i> , 383 U.S. 301 (1966)	17, 18
<i>Wilkes County, Georgia v. United States</i> , 450 F.Supp 1171 (D.D.C. 1978), <i>aff'd mem.</i> , 439 U.S. 999 (1978)	9

United States Constitutional Provisions

Tenth Amendment	5, 6, 16, 17
Fourteenth Amendment	14, 18
Fifteenth Amendment	17

Federal Statutes

42 U.S.C. § 1973	12
42 U.S.C. § 1973b	16
42 U.S.C. § 1973c	<i>passim</i>

Federal Regulations

28 C.F.R. § 51.13(e)	10
--------------------------------	----

Table of Authorities
Federal Regulations Cont'd

28 C.F.R. § 51.54(a)	10
28 C.F.R. § 51.54(b)	8

Legislative History

S. REP. No. 417, 97 th Cong., 2d Sess. (1982)	18
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No. 95-1201

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

VICKY M. LOPEZ, CRESCENCIO PADILLA,
WILLIAM A. MELENDEZ, and DAVID SERENA,
Appellants,

v.

MONTEREY COUNTY, CALIFORNIA,
STATE OF CALIFORNIA, *Appellees,*

and

STEPHEN A. SILLMAN, *Intervenor-Appellee*

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT
OF CALIFORNIA

REPLY BRIEF FOR APPELLANTS

ARGUMENT

Most of the arguments presented by Appellee State of California ("Appellee" or "State") seek to distract from the one issue that this Court must decide: whether a district court can order implementation of an unprecleared election plan in Monterey County, California ("County"), a jurisdiction subject

to the Section 5 preclearance requirements of the Voting Rights Act, 42 U.S.C. § 1973c. To the extent that the State addresses this question, its brief reflects a fundamental misunderstanding of this Court's longstanding Section 5 precedents.

I. THE DISTRICT COURT'S ORDER VIOLATED THE SECTION 5 PRECLEARANCE PROVISIONS

Appellee believes that Appellants are not entitled to a Section 5 remedy "because neither discrimination nor retrogression has been established." Appellee State's Brief on the Merits ("Appellee Brief") at 20. Yet that argument ignores the threshold issue presented when a Section 5 covered jurisdiction has implemented a change in voting practices that has not been precleared.¹ As this Court held in *Allen v. State Bd. of Elections*: "Such a change could be made either with or without a discriminatory purpose or effect; however, the purpose of § 5 was to submit such changes to scrutiny." 393 U.S. 544, 570 (1969).

Appellee also contends that remedial relief is inappropriate because the Section 5 violation is not "material." Appellee Brief at 20. Irrespective of how the State chooses to label this Section 5 violation, a simple fact remains: the at-large or countywide method of electing municipal court judges has not

¹ The district court has consistently held that a series of county ordinances which consolidated judicial districts into a single county judicial district with countywide elections were subject to the Section 5 preclearance provisions and could not be implemented absent Section 5 approval. See Joint Appendix ("Jt. App.") 47 (Order Granting Plaintiffs' Motion for Partial Summary Judgment and Denying Defendant's Motions), 123 (Order Enjoining Elections Pending Preclearance of Permanent Plan Except for Court-Ordered Special Election in 1995).

received Section 5 preclearance. Absent such approval, the at-large method of election cannot be implemented in any judicial elections. *Clark v. Roemer*, 500 U.S. 646, 652 - 53 (1991).

The State seeks to distinguish this precedent on two grounds. First, the State argues that there is no Section 5 violation because the district court did not implement the County's unprecleared plan but instead, implemented an at-large election plan pursuant to the court's equitable powers. Appellee Brief at 19. The State's argument elevates form over substance.

There is no dispute that the countywide method of electing municipal court judges incorporated in the district court's November 1, 1995, Order is the same as the countywide method of election resulting from the implementation of the unprecleared county ordinances.

The fact that the district court issued the November 1, 1995, Order pursuant to its inherent equitable powers does not, under the circumstances presented in this appeal, insulate the countywide plan from Section 5 review. In *McDaniel v. Sanchez*, 452 U.S. 130 (1981), this Court articulated the standards for determining whether election plans incorporated within a federal court order had to be submitted for Section 5 approval prior to implementation. As stated by this Court, election plans incorporated in a federal court order which reflect the policy choices of the Section 5 covered jurisdiction cannot be implemented until the plan secures Section 5 approval. *Id.* at 153.²

² Although election plans which do not reflect the jurisdiction's policy choices are not subject to Section 5 preclearance, such court-ordered plans "... should follow the appropriate Section 5 standards, including the body of administrative and judicial precedents developed in Section 5

The countywide method of election incorporated in the November 1, 1995, Order is not a court-ordered plan exempt from Section 5 preclearance. At the time this litigation was filed in 1991, the method of electing municipal court judges was countywide. Clearly, this election method was the direct outcome of the County's express policy choices. These policy choices resulted in the consolidation of the County's municipal and justice court districts into a single municipal court district with countywide elections.

By reverting to the countywide method of election for municipal court judges, the district court's November 1, 1995, Order reflects the County's policy choices. In fact, the district court earlier had noted that the "...county-wide election system was the legislative choice of the citizens prior to the filing of this lawsuit." Jt. App. 172. Accordingly, the countywide method of election is not insulated from Section 5 preclearance. Absent such review and approval, the system cannot be implemented in any elections. *Cf. Clark*, 500 U.S. at 652 - 53.

Affirming the district court's Order would result in circumvention of the Section 5 preclearance requirements. Political subdivisions subject to the preclearance requirements could avoid Section 5 by simply awaiting litigation and then requesting the district court to implement the voting change as an equitable remedy. *See* Brief for Appellants at 38 - 40. For these reasons, the November 1, 1995, Order must be reversed.

Second, the Appellee argues that the countywide method of electing municipal court judges has been implemented pursuant to state statutes which are not subject to Section 5 preclearance. Appellee Brief at 19 - 20. This argument is similarly without merit. The consolidation of the judicial

cases.' " *McDaniel*, 452 U.S. at 149.

districts was dependent upon the county ordinances. The county ordinances modified judicial district boundaries and ultimately resulted in the establishment of a countywide method of election for municipal court judges. Absent Section 5 approval, this countywide election plan resulting from these county ordinances cannot be implemented.

The Appellee argues that the appropriate focus should be on subsequent state statutes which superseded the county ordinances. Appellee Brief at 28 - 30. The Appellee contends that the authority to conduct countywide municipal court elections is now derived from state statutes, not the county ordinances. As such, Appellee believes, the issues related to the ordinances have been rendered moot. This argument was considered and rejected by the district court.³ Indeed, the district court's permanent injunction against the implementation of the countywide system remains in effect. *See* Jt. App. 59, 173.

In summary, the district court committed an error in law by implementing a countywide method of electing municipal court judges, especially in view of the district court's finding that there continues to be a Section 5 violation. Jt. App. 166. Given this finding and the corresponding permanent injunction, the lower court's November 1, 1995, Order represents a substantial departure from this Court's precedent and should be reversed.⁴

³ While the Appellee is free to raise this argument again in future proceedings, Jt. App. 166, n. 2, the possibility that it may prevail is pure speculation and certainly cannot justify affirming the district court's Order.

⁴ Appellants address below the remaining arguments of the Appellee regarding the Tenth Amendment to the United

II. IT IS UNCONTESTED THAT THE DISTRICT COURT HAD ALTERNATIVES TO THE UNPRECLEARED COUNTYWIDE PLAN

A district court may allow implementation of an unprecleared election plan only if "extreme circumstances" are present. *Clark*, 500 U.S. at 654 - 55. No such exigency existed here. Indeed, the district court had various alternatives available other than implementation of the unprecleared countywide election plan. Brief for Appellants at 22. These alternatives could have been timely explored in an evidentiary hearing. For example, the district court's concerns regarding the extension of terms of those municipal court judges elected in the June 6, 1995, special judicial election could have been addressed by conducting an evidentiary hearing into the constitutionality of that election plan. If, upon proper reflection, the district court concluded that the plan was unconstitutional, it could have devised an alternative district-based plan which met constitutional standards.

There was ample opportunity for the district court to

States Constitution, *infra* pp. 16 - 18, and whether the consolidation ordinances are subject to Section 5, *infra* at 8 - 12. Finally, the Appellee also claims that the defense of laches bars Section 5 relief. In making this argument, the State focuses on the fact that the relevant ordinances were enacted several years prior to this action being filed in 1991. But the obligation to comply with Section 5, throughout this passage of time, was upon the covered jurisdiction, not upon the Appellants. See *Dotson v. City of Indianola*, 514 F.Supp. 397, 401 (N.D.Miss. 1981), *aff'd*, 456 U.S. 1002 (1982). Further, "[t]he duty to obtain federal approval of new voting [changes] ... is a continuing one. It arises anew each time the defendant enacts or seeks to administer an uncleared voting regulation." *Id.*

conduct such an evidentiary hearing.⁵ Even if there was not enough time to conduct such a hearing prior to the commencement of the March 26, 1996, electoral process, a judicial election could have been scheduled to coincide with the general election in November 1996, with any runoffs in December, all in advance of the January 1997 expiration of terms.

Clearly, alternatives existed. In fact, even the Appellee has never contested the fact that these alternatives were available to the district court. No "extreme circumstances" were present necessitating the district court's November 1, 1995, Order to implement an unprecleared election plan.

III. THE COUNTYWIDE METHOD OF ELECTION INCORPORATED IN THE NOVEMBER 1, 1995, ORDER VIOLATES THE STANDARDS FOR COURT-ORDERED PLANS

As demonstrated above, the countywide method of election ordered by the district court is not exempt from Section 5 preclearance and thus, cannot be implemented in any elections until Section 5 approval is obtained. *McDaniel*, 452 U.S. at 153. However, should this Court deem the court-ordered election plan exempt from Section 5 preclearance, this plan nonetheless violates the standards established for court-ordered plans.

The most significant standard is the application of a retrogression analysis to the court-ordered plan. See Brief for

⁵ Indeed, at the September 28, 1995, status conference, Appellants requested an evidentiary hearing to determine whether a court-ordered remedy would be appropriate. *Jt. App.* 20, Docket Entry No. 161, 30 - 31.

Appellants at 38 - 42. Under any retrogression measure, the countywide method of election results in a retrogression of minority voting strength. In conducting a retrogression analysis, the "last legally enforceable practice or procedure used by the jurisdiction," 28 C.F.R. § 51.54(b), becomes the appropriate benchmark for determining whether a new voting change results in a reduction of minority voting strength. Appellants contend that the appropriate benchmark for evaluating the retrogressive effect of the countywide method of election is the temporary district election plan which received Section 5 approval and was implemented in the June 6, 1995, special judicial election. Brief for Appellants at 41 & n. 29. The 1995 plan contained two election districts each consisting of a 52% Latino eligible voter population, while the countywide election plan contained a 17% Latino eligible voter population. Appellants' Jurisdictional Statement Appendix 89, 91. A reduction from 52% to 17% constitutes retrogression. Alternatively, when measured against the election plan in place on November 1, 1968, the date of Section 5 coverage for the County, the countywide method of election is also retrogressive. The 1968 judicial election plan contained three districts each having over a 50% Latino eligible voter population.⁶

⁶ For these precise reasons, the County stipulated that it could not demonstrate that the countywide system did not have a retrogressive effect on Latino voting strength. Brief for Appellants at 8 - 9. The Appellee attacks this stipulation as "far too conclusory [*sic*] and nebulous" to support any remedial response because the County did not explain "why" it could not prove it was unable to demonstrate the lack of a retrogressive effect. Brief for Appellee at 23 - 24. The Appellee's attack on a supported, written stipulation of a party is particularly curious in light of its reliance on an oral statement of a lawyer as the only "evidence" that the June 1995 plan was race-based.

The Appellee seeks to cloud this analysis in arguing that retrogression has not been established. Appellee Brief at 20 - 28. Yet Appellants need not establish retrogression; instead, the district court may not implement a court-ordered plan exempt from Section 5 review unless it is shown to be nonretrogressive. *McDaniel*, 452 U.S. at 147 - 50. But since the district court never conducted the necessary evidentiary hearing to assess the plan's retrogressive nature, this essential predicate is missing.

Finally, assuming *arguendo* that neither the 1968 election plan nor the June 6, 1995, election plan can properly serve as benchmarks, the district court's retrogression analysis remains seriously flawed. Pursuant to *Wilkes County, Georgia v. United States*, 450 F.Supp. 1171, 1176 (D.D.C. 1978), *aff'd mem.*, 439 U.S. 999 (1978), if no plan is available for comparison purposes, the district court should have compared the countywide method of election with a district-based election plan which fairly reflects the voting strength of the minority voting community. But the district court instead held that it "cannot say that a county-wide election plan is necessarily unlawfully retrogressive *in comparison with the prior plan or the system in effect prior to the consolidation ordinances.*" *Jt. App.* 172 (emphasis added). The district court thus failed to properly analyze whether its countywide method of election was retrogressive and should never have ordered implementation of such an election plan before comparing it with a plan which fairly reflects the voting strength of the Latino community in Monterey County.

The Appellee asserts an additional argument regarding retrogression. The Appellee states that no meaningful retrogression analysis can be conducted because: 1) the different judicial offices involved in the consolidation process foreclose such an analysis; and 2) the different population and geographic sizes of each of the judicial districts preclude such an analysis.

Appellee Brief at 26. Appellee does not provide any legal support for this restrictive interpretation and application of the retrogression analysis. Under the Appellee's framework, a conversion of a justice court to a municipal court which admittedly reduced the voting strength of the minority community would not be subject to Section 5 review. Similarly, the consolidation of a heavily populated municipality with a sparsely populated municipality which resulted in a reduction of minority voting strength would also be exempt. Yet applicable precedent and the federal regulations governing the application of Section 5 do not support such a draconian result.

The regulations require a focus on changes in the voting constituency of an elective office and the effect of these changes on minority voting strength. *See, e.g.*, 28 C.F.R. § 51.13 (e), § 51.54 (a). In changes involving annexations to municipalities, usually a smaller population is annexed to a larger municipal population base. This disparity in population size does not preclude a retrogression analysis. On the contrary, the retrogression analysis focuses on whether there is a reduction of minority voting strength in the municipality as a result of the annexations. *See, e.g., Perkins v. Matthews*, 400 U.S. 379 (1971); *see also City of Port Arthur v. United States*, 459 U.S. 159, 165 (1982): "[Perkins] held that annexations by a city are subject to § 5 preclearance because increasing the number of eligible voters dilutes the weight of the votes of those to whom the franchise was limited before the annexation and because the right to vote may be denied by dilution or debasement just as effectively as by wholly prohibiting the franchise."

Under the Appellee's argument, minority voters would not have any Section 5 protection when a justice court district with a small population containing a majority of Latino voters is consolidated with a municipal court district resulting in a consolidated judicial district containing less than a majority of

Latino voters. According to the Appellee's argument, since the consolidation eliminated a justice court district, one cannot conduct a retrogression analysis because there are two different judicial offices involved. However, the Appellee's argument again elevates form over substance.

The appropriate focus in this example is on whether there has been a reduction in minority voting strength. The transfer of judicial responsibilities from a justice court judge to a municipal court judge, by itself, might be exempt from Section 5 review. *See Presley v. Etowah County Comm'n*, 502 U.S. 491 (1992). However, when the change involving the transfer of judicial duties is accompanied by a change affecting both the voting constituency of the judicial district and the voting strength of the minority community, such a change is not exempt from Section 5 review.⁷ A reduction in voting strength would constitute retrogression. As a result, the Section 5 covered jurisdiction would have to modify its election system to fairly reflect the voting strength of the minority community in order to secure approval for the consolidation of the previously separate voting constituencies. *City of Rome v. United States*, 446 U.S. 156, 187 (1980).⁸

⁷ For these reasons, the district court concluded that the ordinances effecting these changes were subject to Section 5. *Jt. App.* 54.

⁸ The Appellee argues that the inapplicability of the one person one vote principle to elective judicial offices also renders the retrogression analysis meaningless. Appellee Brief at 28. Again, the Appellee's argument is predicated upon a faulty assumption. Exemption from the one person one vote principle does not automatically bar a retrogression analysis. If it did, then consolidation of multiple municipalities into a single municipality with accompanying changes in voting constituencies

Accordingly, assuming the issue of retrogression is relevant, this Court should reverse the district court's November 1, 1995, Order for failure to comply with the standards established for implementation of court-ordered plans which are exempt from Section 5 review.⁹

IV. THE CONSTITUTIONALITY OF THE JUNE 6, 1995, ELECTION PLAN IS NOT PROPERLY BEFORE THIS COURT

The constitutionality of the June 1995 election plan only becomes relevant in the unlikely event that this Court finds that the November 1, 1995, Order is exempt from the preclearance requirement in that it does not reflect the County's policy choices. *See, supra*, at pp. 3 - 5. But even under such a scenario, this Court still must hold that the district court, by its failure to properly assess the constitutionality of the June 1995 plan, erred in refusing to extend the terms of the sitting judges

and minority voting strength would also be exempt. In this example, the one person one vote principle is inapplicable to evaluate population disparities since the original municipalities were separate political entities. Yet the reduction in minority voting strength could clearly be evaluated in a retrogression analysis. *See, e.g., City of Port Arthur*, 459 U.S. at 165 - 66 (one person one vote principle not directly applicable to municipal annexations yet reduction in minority voter population subject to retrogression analysis).

⁹ The district court's November 1, 1995, Order also violated other standards for court-ordered plans. *See* Brief for Appellants at 42 - 45 (district court should have determined that countywide method of election did not violate Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, and provided persuasive justification for not implementing single-member districts).

elected under that plan.

As a procedural matter, critical to the constitutional analysis, the district court did not even conduct an evidentiary hearing to determine if the election plan was unconstitutional. Absent this essential step, the district court had no factual predicate for its conclusions. The district court's concerns regarding the constitutionality of the election plan, therefore, cannot justify the implementation of an unprecleared countywide plan.

Nevertheless, armed with this Court's recent decisions in *Miller v. Johnson*, 115 S.Ct. 2475 (1995), *Shaw v. Hunt*, 64 U.S.L.W. 4437 (June 13, 1996), and *Bush v. Vera*, 64 U.S.L.W. 4452 (June 13, 1996), Appellee takes aim at the temporary district plan, alleging that it was "race-based," that it served no compelling state interest, and was not "narrowly tailored," to remedy the County's undisputed violation of Section 5. Appellee Brief at 44 - 45.

The district court similarly believed that *Miller* raised "substantial doubt as to whether legislative division into race-based districts or election areas can ever withstand constitutional scrutiny." *Jt. App.* 167. Without any fact-finding as to the Appellee's allegations, converting *Miller* into a *per se* prohibition on race-based remedial orders, the district court refused to extend the terms of the judges elected pursuant to the June 6, 1995, election plan.

Nothing in *Miller*, *Bush*, or *Shaw* justifies this expedient dispatch of what Appellants can prove is an entirely legal plan. Nor do those decisions diminish a district court's power to remedy proven violations of the Voting Rights Act, and its duty to insure that, in cases involving jurisdictions subject to the Section 5 preclearance provisions, the court-ordered plans do

not cause any retrogression of minority voting strength. See *McDaniel*, 452 U.S. at 130 and Brief for Appellants at 42 - 44.

In *Bush* and *Shaw*, this Court addressed congressional districts that were found to be subject to strict scrutiny because they departed dramatically from traditional redistricting principles. *Shaw* presented North Carolina's congressional plan for review, while *Bush* involved a challenge to congressional districts in Texas. Both of these cases were reviewed by this Court upon a full factual record addressing the constitutionality of the various congressional districts. *Shaw*, 64 U.S.L.W. at 4438 - 39; *Bush*, 64 U.S.L.W. at 4454 - 56. In both cases, this Court ruled, based on the extensive factual record developed in the district court proceedings, that the congressional districts under review were unconstitutional under the Fourteenth Amendment to the United States Constitution because the districts were not narrowly tailored to further a compelling governmental interest. *Shaw*, 64 U.S.L.W. at 4440 - 43; *Bush*, 64 U.S.L.W. at 4459 - 61.

In these cases, this Court took care to instruct that the use of race as a factor in districting does not by itself invoke strict scrutiny, and that in any event, strict scrutiny is not necessarily fatal. For example in *Miller*, 115 S.Ct. at 2490, citing, *Shaw v. Reno*, 509 U.S. 630, 646 (1993), this Court stated:

“ ‘[W]hen members of a racial group live together in one community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes.’ ”

And in *Bush*, this Court stated:

“Strict scrutiny does not apply merely because redistricting is performed with consciousness of race. See *Shaw I supra*, at 646. Nor does it apply to all cases of intentional creation of majority-minority districts. See *Dewitt v. Wilson*, 856 F.Supp. 1409 (E.D.Cal. 1994) (strict scrutiny did not apply to an intentionally created compact majority-minority district), *summarily aff'd*, 515 U.S. ____ (1995)”

Bush, 64 U.S.L.W. at 4454.

Finally, *Bush* does not support Appellee's contention that a statement made by the County's attorney in a status conference may substitute for the probing factual inquiry that both precedes and drives the strict scrutiny analysis. Even direct evidence of a decision to create a majority-minority district is but an “ingredient” in the analysis, insufficient by itself to trigger strict scrutiny. *Id.* at 4455.¹⁰

These cases do not, as the Appellee suggests, invalidate the formulation of compact majority-minority districts. On the contrary, these decisions give guidance to district courts in carefully crafting election plans to remedy violations of the Voting Rights Act. *Bush*, 64 U.S.L.W. at 4462.

¹⁰ The Appellee's contention that the election plan is unconstitutional for lack of narrow tailoring suffers from the same dearth of factual findings. Only an evidentiary hearing can produce the factual record necessary to determine the effect of a remedial plan on the political participation of Latino voters in Monterey County. See, e.g., *City of Port Arthur*, 459 U.S. at 165 - 66.

In summary, the constitutionality of the temporary election plan is not properly before this Court. The district court's reliance on *Miller* to order into effect an unprecleared countywide plan was in error and should be reversed.

V. THERE ARE NO TENTH AMENDMENT ISSUES JUSTIFYING AFFIRMANCE OF THE DISTRICT COURT'S ORDER

The Appellee seeks to challenge the propriety of the County's designation as a Section 5 covered jurisdiction and in doing so, suggests that the Tenth Amendment somehow bars Section 5 remedial relief. Yet the issue is not properly before this Court as it has never been considered by the district court.¹¹ In any event, this Court's precedent firmly rejects any such Tenth Amendment concerns.

¹¹ Furthermore, the Voting Rights Act explicitly provides a remedy for jurisdictions to secure an exemption from Section 5. This "bail-out" provision allows a covered jurisdiction with an established record of compliance with the Voting Rights Act to institute a declaratory judgment action in the United States District Court for the District of Columbia and seek an exemption from the Section 5 preclearance requirements. 42 U.S.C. § 1973b. Jurisdictions should not be allowed to circumvent this statutory procedure by seeking an exemption from Section 5 review as a defense to an action brought by private plaintiffs seeking to enforce Section 5. Finally, the "bail-out" action must be brought by the state or political subdivision which was designated as a jurisdiction subject to Section 5. Since the State of California was not designated as a Section 5 covered jurisdiction, it is doubtful that the State is authorized to bring a "bail-out" action on behalf of the County. See *City of Rome*, 446 U.S. at 167.

In *South Carolina v. Katzenbach*, this Court held that the Section 5 preclearance requirement is an appropriate method for Congress to use to enforce the Fifteenth Amendment. 383 U.S. 301, 329 - 37 (1966). The Fifteenth Amendment was "specifically designed as an expansion of federal power and an intrusion on state sovereignty." *City of Rome*, 446 U.S. at 179. Thus, the Voting Rights Act, including Section 5, is "an appropriate means for carrying out Congress' constitutional responsibilities." *South Carolina v. Katzenbach*, 383 U.S. at 308.

Appellee seeks to obscure this clear precedent by overstating this Court's concerns in *Miller* regarding potential Tenth Amendment issues. Appellee Brief at 31 -32 ("In *Miller*, this Court suggested that, *absent strong evidence of discrimination*, Congress' application of Section 5 restrictions and preclearance requirements to the States may [violate the Tenth Amendment].") (emphasis added). In fact, this Court's concerns were much narrower and related specifically to the Justice Department's "maximization policy." *Miller*, 115 S.Ct. at 2493. "In utilizing § 5 to require States to create majority-minority districts wherever possible, the Department of Justice expanded its authority under the statute beyond what Congress intended and we have upheld." *Id.* This Court thus concluded: "There is no indication Congress intended such a far-reaching application of § 5 so we reject the Justice Department's interpretation of the statute and avoid the constitutional problems that interpretation raises." *Id.*

In stark contrast, the district court here did not make any findings regarding a "maximization policy." (Nor, given the compact nature of the relevant districts, could it have.) But, most fundamentally, this Court's concerns in *Miller* surely could not be triggered before the district court conducted an evidentiary hearing and concluded that the June 1995 plan

somehow violated the Fourteenth Amendment.

CONCLUSION

The November 1, 1995, Order is inconsistent with this Court's precedent initially established in *South Carolina v. Katzenbach* which stated that Section 5 was a necessary and appropriate Congressional response to combat the pervasive voting discrimination experienced by minority communities. Congress reauthorized Section 5 in 1970, 1975, and 1982, because of the extensive record supporting the continued necessity for the preclearance protections. *See S. REP. No. 417, 97th Cong., 2d Sess., 4 - 15 (1982)*. By implementing a countywide method of election which has not secured Section 5 approval, the district court's Order represents a circumvention of the Voting Rights Act which would result in the nullification of the Section 5 preclearance provisions. For these reasons, the district court's November 1, 1995, Order must be reversed.

Respectfully Submitted,

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6

Supreme Court, U.S.

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No. 95-1201

In the Supreme Court of the United States

OCTOBER TERM, 1995

VICKY M. LOPEZ, ET AL., APPELLANTS

v.

MONTEREY COUNTY, CALIFORNIA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING APPELLANTS**

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QUESTION PRESENTED

Whether the district court erred in ordering an election using voting changes that it concluded had not been precleared, as required by Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	10
Argument:	
The district court erred in ordering elections under an electoral plan that was subject to Section 5 and that had not received administrative or judicial preclearance	12
A. Section 5 required the district court to enjoin implementation of Monterey County's unpre- cleared voting changes	12
B. No "extreme circumstance" warranting implementation of unprecleared electoral changes exists in this case	18
Conclusion	26

TABLE OF AUTHORITIES

Cases:

<i>Adarand Constructors, Inc. v. Pena</i> , 115 S. Ct. 2097 (1995)	20
<i>Allen v. State Bd. of Elections</i> , 393 U.S. 544 (1969)	10, 11, 13
<i>Beer v. United States</i> , 425 U.S. 130 (1976)	6, 12, 24
<i>Berry v. Doles</i> , 438 U.S. 190 (1978)	24
<i>Brooks v. State Bd. of Elections</i> :	
775 F. Supp. 1470 (N.D. Ga.), aff'd, 498 U.S. 916 (1990)	14
790 F. Supp. 1156 (S.D. Ga. 1992)	23
<i>City of Lockhart v. United States</i> , 460 U.S. 125 (1983)	24
<i>City of Rome v. United States</i> , 446 U.S. 156 (1980)	12, 13, 23
<i>Clark v. Roemer</i> , 500 U.S. 646 (1991)	passim
<i>Conner v. Johnson</i> , 420 U.S. 690 (1971)	18
<i>Connor v. Finch</i> , 431 U.S. 407 (1977)	25

IV

Cases—Continued:	Page
<i>Connor v. Waller</i> , 421 U.S. 656 (1975)	13
<i>DeWitt v. Wilson</i> , 856 F. Supp. 1409 (E.D. Cal. 1994), aff'd in relevant part and dismissed in part, 115 S. Ct. 2637 (1995)	20, 21
<i>Edge v. Sumter</i> , 775 F.2d 1509 (11th Cir. 1985)	24
<i>Haith v. Martin</i> , 618 F. Supp. 410 (E.D.N.C. 1985), aff'd, 477 U.S. 901 (1986)	14
<i>Hathorn v. Lovorn</i> , 457 U.S. 255 (1982)	13
<i>Houston Lawyer's Ass'n v. Attorney General of Texas</i> , 501 U.S. 419 (1991)	25
<i>Katzenbach v. Morgan</i> , 384 U.S. 641 (1966)	25
<i>Lucas v. Townsend</i> , 486 U.S. 1301 (1988)	13
<i>McCain v. Lybrand</i> , 465 U.S. 236 (1984)	13, 15, 17
<i>McDaniel v. Sanchez</i> , 452 U.S. 130 (1981) ...	13, 16, 18
<i>Miller v. Johnson</i> , 115 S. Ct. 2475 (1995) ..	8, 9, 11, 18, 19 20, 21, 22, 23
<i>NAACP v. Hampton County Election Comm'n</i> , 470 U.S. 166 (1985)	24, 25
<i>Reynolds v. Sims</i> , 377 U.S. 533 (1964)	25
<i>South Carolina v. Katzenbach</i> , 383 U.S. 301 (1966)	12, 13
<i>Taylor v. McKeithen</i> , 407 U.S. 191 (1982)	25
<i>Village of Arlington Heights v. Housing Devel. Corp.</i> , 429 U.S. 252 (1977)	21
<i>Wallace v. Jaffre</i> , 472 U.S. 38 (1985)	21
<i>Wise v. Lipscomb</i> , 437 U.S. 535 (1978)	23
Constitution, statutes and regulations:	
Cal. Const. Art. VI:	
§ 5 (1992)	3
§ 5 (1994)	3
§ 5(a)	6
§ 15	22
§ 16	22
§ 16(b)	6

V

Statutes and regulations—Continued:	Page
Voting Rights Act of 1965, 42 U.S.C. 1973 <i>et seq.</i> :	
§ 2, 42 U.S.C. 1973	26
§ 5, 42 U.S.C. 1973c	1, 2, 4, 10, 13
28 U.S.C. 2284	4
Cal. Civ. Proc. Code § 84 (West 1982)	22
1983 Cal. Stat. 4915	4, 15, 16
28 C.F.R. Pt. 51:	
Section 51.14(2) (1981)	16
Section 51.14(9) (1987)	16
Section 51.18(a)	18
Section 51.22(b)	16
App.	2
Miscellaneous:	
<i>Annual Report of the Judicial Council of California</i> (1994).....	14
S. Rep. No. 295, 94th Cong., 1st Sess. (1975)	18, 24

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INTEREST OF THE UNITED STATES

This case concerns the relief that is appropriate when a covered jurisdiction fails to obtain preclearance of voting changes, as required by Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. Under Section 5, the Attorney General is responsible for reviewing voting changes submitted for administrative preclearance and for defending declaratory judgment actions seeking judicial preclearance brought in the United States District Court for the District of Columbia. The Act also gives the Attorney General authority to bring actions to prevent the implementation of unprecleared voting changes. The Court's resolution of this case will

affect the Attorney General's enforcement responsibilities under Section 5. The United States participated as *amicus curiae* in the action below and, in response to this Court's invitation, filed a brief in support of appellants' application to this Court for a stay.

STATEMENT

Congress enacted the Voting Rights Act of 1965 to help eliminate discrimination in voting. Section 5 of the Act, 42 U.S.C. 1973c, provides that a covered jurisdiction may not implement any change in election practices unless it first obtains a declaratory judgment from a three-judge panel of the United States District Court for the District of Columbia that the change does not have the purpose, and will not have the effect, of denying the right to vote on account of race, color, or membership in a language minority group. Alternatively, the change may be enforced if, within 60 days after its submission to her, the Attorney General of the United States has interposed no objection to it.

1. Monterey County, California, is a jurisdiction covered under Section 5 with respect to voting practices "different from that in force or effect on November 1, 1968." 42 U.S.C. 1973c; see also 28 C.F.R. Pt. 51, App. The County's ordinances consolidating judicial election districts, altering district boundaries, and converting a district system to a county-wide system in which the judges are elected at large are changes in voting practices covered by the pre-clearance provisions of Section 5.

According to the 1990 census, thirty-four percent of Monterey County's total population, and seventeen percent of its citizen voting age population, is

Hispanic. J.S. App. 94. Before 1995, no Latino had ever been elected or appointed to the Monterey County municipal court. The two Latino candidates who had run for the municipal court had lost in the 1986 elections. *Id.* at 103.¹ Similarly, from 1890 until 1992, no Latino had ever served on the Monterey County Board of Supervisors. *Id.* at 98. The County and appellants have stipulated that elections in Monterey County are characterized by white bloc voting, which has operated to defeat the electoral choices of Latinos. *Id.* at 95-96.

On November 1, 1968, the date it became covered under Section 5, Monterey County contained two municipal court districts, each with two judges, and seven justice court districts, each with one judge.² Those judgeships were filled through separate district elections. Between 1968 and 1983, the Monterey County Board of Supervisors adopted a series of ordinances that consolidated and altered the boundaries of the municipal and justice court districts. As a result of those ordinances, by 1983 the

¹ Shortly after the district court issued its December 20, 1994, order requiring an interim election under a remedial electoral plan, see pp. 7-8, *infra*, the Governor of California appointed the first two Latinos ever to sit on the Monterey County municipal court. In the June, 1995, election held under the remedial plan, one of the appointed Latino judges was re-elected as an unchallenged incumbent. The second appointed Latino judge was defeated by another Latino candidate. Status Conf. Statement of County at 2-3.

² Prior to 1994, justice courts existed in California districts containing 40,000 or fewer persons, and municipal courts existed in districts containing more than 40,000 persons. Cal. Const. Art. VI, § 5 (1992). In a 1994 referendum/ California eliminated justice courts. Proposition 191; see Cal. Const. Art. VI, § 5 (1994).

County had converted the preexisting judicial election system—under which four municipal court positions and seven justice court positions were filled through separate district elections—to a system in which nine municipal court judges were elected at large to a single county-wide municipal court. J.S. App. 12. At present, the municipal court has ten judges elected at large.

2. On September 6, 1991, appellants, who are Latino voters in Monterey County, filed this suit under Section 5 of the Voting Rights Act. They alleged that the County violated Section 5 by implementing new procedures for the election of lower court judges without first obtaining preclearance from the Attorney General or from a three-judge panel of the United States District Court for the District of Columbia. J.S. App. 12.³

On April 1, 1993, the district court entered partial summary judgment for appellants. It held that the county ordinances that consolidated the judicial districts and converted the district system to an at-large, county-wide electoral system were changes in voting subject to Section 5's preclearance requirement. The court further held that the consolidation ordinances had never been judicially or administratively precleared.⁴ The court ordered the County

³ Pursuant to 42 U.S.C. 1973c and 28 U.S.C. 2284, a three-judge panel of the United States District Court for the Northern District of California was convened to consider appellants' Section 5 claim. J.S. App. 12.

⁴ The court rejected the County's contention that the Attorney General's preclearance of a state statute, 1983 Cal. Stat. 4915, "implicitly" cleared all of the previously enacted but unsubmitted county ordinances that effected the consolidations, *Lopez v. Monterey County*, Order Granting Plaintiffs' Motion

to seek preclearance of the ordinances, and held that "they cannot be implemented by [the] county until such clearance is received," *Lopez v. Monterey County*, Order Granting Plaintiff's Motion for Partial Summary Judgment and Denying Defendant's Motions, No. C-91-20559-RMW, slip op. 13 (Apr. 1, 1993). J.S. App. 12.⁵

On August 10, 1993, the County filed suit in the United States District Court for the District of Columbia, seeking a declaratory judgment that its consolidation ordinances did not have the purpose or effect of discriminating on the basis of race, color, or language-minority status. *County of Monterey v. United States*, C.A. No. 93-1639 (D.D.C. filed Aug. 10, 1993). On October 7, 1993, the County dismissed that action voluntarily.⁶ The County stipulated that it was "unable to establish that the Municipal Court Judicial Court Consolidation Ordinances adopted by the County between 1968 and 1983 did not have the effect of denying the right to vote to Latinos in Monterey County due to the retrogressive effect

for Partial Summary Judgment and Denying Defendant's Motions, No. C-91-20559-RMW), slip op. 13 (Apr. 1, 1993. With) respect to one of the ordinances, which was referred to in the 1983 statute, the court said that, "[e]ven assuming that the Attorney General's clearance of state statute 1249 operated to implicitly preclear County Ordinance 2930 to which the statute referred, the parties agreed during the oral argument in this matter that all six (6) ordinances should be submitted for preclearance if all ordinances were not precleared." *Ibid.*

⁵ The court denied the County's motion to dismiss the action for failure to include the State as an indispensable party, and refused to join the State as a defendant. *Lopez v. Monterey County*, slip op. 7.

⁶ The action was dismissed without prejudice to any future claim. Stipulated Dismissal (Oct. 7, 1993).

several of these ordinances had on Latino voting strength in Monterey County." J.S. App. 13.⁷

The parties then submitted several proposed electoral plans for the Northern District of California District Court's review. On December 22, 1993, the State intervened for the limited purpose of objecting to the parties' proposed plans.⁸ The State argued that aspects of the proposed plans were contrary to provisions of the California Constitution. J.S. App. 69. Specifically, it argued that the proposed plans would contravene a state constitutional provision that prohibits division of cities into separate municipal court districts, Cal. Const., Art. VI, § 5(a), and a provision that generally requires the electoral and jurisdictional bases of municipal court judgeships to be coextensive, Cal. Const., Art. VI, § 16(b). J.S. App. 13. The court declined, "without prejudice," to approve the proposed electoral plans. *Id.* at 13-14. At a March 13, 1994, hearing, the County presented to the court findings by the County Board of Supervisors "supporting the Board's conclusion that '[t]he Board of Supervisors is unable to devise or prepare any plan for the election of municipal court judges in Monterey County that does not conflict with at least one state law and still complies with the Voting Rights Act.'" J.S. App. 14.

⁷ Under Section 5, covered jurisdictions have the burden of demonstrating, *inter alia*, that an electoral change will not "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States*, 425 U.S. 130, 141 (1976).

⁸ The court also allowed a municipal court judge, Judge Michael S. Fields, to intervene in his personal capacity. J.S. App. 13.

On June 1, 1994, the district court enjoined the County from holding elections for municipal court judgeships pending adoption and preclearance of a lawful, permanent electoral plan. The court ordered the County to take steps necessary to obtain changes in existing state law so that such a plan could be implemented. J.S. App. 14. As a result, the elections scheduled for 1994 did not take place.

On December 20, 1994, the court ordered that 1995 elections for seven municipal court seats take place under a special election plan that had been jointly proposed by appellants and the County as an interim remedy. J.S. App. 23. The special election plan divided the County into four electoral districts but did not alter the county-wide administrative and jurisdictional structure of the municipal court system. *Id.* at 18-20.⁹ The court ordered that the judges elected under the interim plan would serve an eighteen-month term, instead of the normal six-year term.

The court concluded that elections under an interim plan were necessary because "[c]ontinuance of the injunction without any election pending implementation of a precleared system would deprive the voters of their right to elect judges." J.S. App. 16. The court rejected an at-large electoral system as an interim remedy, reasoning that "[e]vidence has been offered that Latino voters have had their voting strength diluted and, therefore, a special election under an at-large system would probably preclude

⁹ The court found that "the County made a good faith effort to secure passage of an amendment to the California Constitution regarding the configuration of municipal court districts in Monterey County" (J.S. App. 14), but that those efforts had been unsuccessful.

[Latinos] from electing any judge of their choice.” *Id.* at 19. The court further concluded that the interim plan did not intrude unnecessarily on state interests. Although the electoral districts employed in the interim plan were not coextensive with the primary jurisdictional base of each judicial office, the court noted that current state law did not require “strict linkage” of electoral and jurisdictional districts. *Id.* at 21. The court also observed that, under California law, “the rights of nonresidents are often judged by resident [municipal court] judges,” and “nonresident judges are frequently assigned to other districts.” *Ibid.* In addition, “[t]he State’s interest in preventing the division of cities does not appear to reflect any compelling state policy,” given that an exception had been made for at least one county. *Id.* at 19.

The interim plan was submitted to the Attorney General for preclearance and the plan was precleared on March 6, 1995. J.S. App. 53-55. The special election occurred June 6, 1995. Pursuant to the court’s orders, the terms of the seven judges elected in the special election, and that of an eighth judge elected previously, will expire on the first Monday in January, 1997. *Id.* at 2.

On November 1, 1995, the court held a status conference to discuss what further interim remedy was appropriate in light of the County’s continuing failure to adopt and preclear a valid, permanent plan. At that conference, the court and parties discussed, *inter alia*, whether this Court’s decision in *Miller v. Johnson*, 115 S. Ct. 2475 (1995), affected the propriety of extending the terms of judges elected under the interim remedial plan. At the status conference, the court did not request, and the parties did not present, evidence regarding the role that racial considerations

played in the development of the plan, or the extent to which a compelling interest, such as compliance with the substantive provisions of the Voting Rights Act, may have justified the plan’s electoral districts. A county attorney expressed the view, however, that the electoral districts in the interim remedial plan were drawn on the basis of race. State Mot. to Dis. App. 13a.

3. On November 1, 1995, the court “modified” its prior injunction forbidding implementation of the unprecleared election system “to allow the county-wide election of municipal court judges at the general election in [March] 1996.” J.S. App. 8. The court ordered that judges elected under the county-wide, at-large plan were to serve “the normal six-year term.” *Ibid.* The court thereby reinstated the County’s unprecleared at-large plan.

Although the court recognized that it was “faced with a Section 5 violation” (J.S. App. 2), it concluded that the unprecleared plan should be implemented because this Court’s decision in *Miller v. Johnson*, *supra*, “has cast substantial doubt upon the constitutionality of extending the terms [of the judges elected under the] interim plan, as that plan used race as a significant factor in dividing the County into election areas.” J.S. App. 3. The court further stated that “[a] return to the status quo that existed before the enactment of the consolidation ordinances is not legal, feasible or desired” (*ibid.*) and that it “[could not] say that a county-wide election plan is necessarily unlawfully retrogressive in comparison with the prior plan or the system in effect prior to the consolidation ordinances.” *Id.* at 7. The court ordered that the injunction would remain in effect as to future elections “pending preclearance of a permanent plan

that complies with the Voting Rights Act and state law." *Id.* at 8.

The court also joined the State as a defendant. It observed that "[i]f the State believes that the County is only administering a State statute and that the failure to preclear the consolidation ordinances is of no significance, it can seek to lift the injunction and have this Section 5 litigation dismissed." J.S. App. 8.

4. Appellants filed a timely notice of appeal to this Court on November 30, 1995. J.S. App. 26-27. On February 1, 1996, this Court granted appellants' motion to stay the district court's order. 116 S. Ct. 833. The Court noted probable jurisdiction on April 1, 1996. 116 S. Ct. 1349.

SUMMARY OF ARGUMENT

A. Section 5 provides that, "unless and until" administrative or judicial preclearance is obtained, a covered jurisdiction may not "enact or seek to administer" any change in its voting procedures. 42 U.S.C. 1973c. As a result, unprecleared voting changes are without legal force and may not be implemented. In order to effectuate that prohibition, this Court has consistently held that Section 5 plaintiffs are entitled to an injunction preventing implementation of unprecleared changes. *Clark v. Roemer*, 500 U.S. 646, 656 (1991); *Allen v. State Bd. of Elections*, 393 U.S. 544, 572 (1969). Absent this right to injunctive relief, Section 5's prophylactic purpose would be thwarted.

In this case, the district court ruled that the at-large, county-wide system of electing lower court judges was a covered change that had not received judicial or administrative preclearance. By nevertheless ordering elections under that system, the district court contravened the rule of *Clark* and *Allen*.

B. 1. This case presents no "extreme circumstance," *Clark v. Roemer*, 500 U.S. at 654, that might justify implementation of an unprecleared voting change. Although the County was on notice for several years that its electoral changes were subject to Section 5's preclearance requirements, it has failed to obtain preclearance of a permanent electoral plan.

2. The district court erred in refusing to extend the terms of judges elected under the interim electoral plan because the plan used race as a "significant factor" in devising electoral boundaries. J.S. App. 3. An electoral plan is unconstitutional under *Miller v. Johnson*, *supra*, only if it subordinates traditional districting principles to racial considerations, and does so without adequate justification. The district court failed to conduct an evidentiary hearing to determine the interim plan's compliance with that fact-specific standard. Absent such an inquiry, it was error to reject the interim plan in favor of an unprecleared, at-large voting scheme.

3. Even if the court had correctly rejected the interim electoral plan, it would have erred in failing to utilize valid remedial options that would have enforced Section 5 while protecting the County's interest in the administration of its judicial system. In particular, the court failed to consider modifying the electoral system that existed prior to the adoption of the consolidation ordinances, or fashioning its own interim plan pending preclearance of a permanent electoral system.

ARGUMENT

THE DISTRICT COURT ERRED IN ORDERING ELECTIONS UNDER AN ELECTORAL PLAN THAT WAS SUBJECT TO SECTION 5 AND THAT HAD NOT RECEIVED ADMINISTRATIVE OR JUDICIAL PRECLEARANCE

A. Section 5 Required The District Court To Enjoin Implementation Of Monterey County's Unprecleared Voting Changes

1. The central purpose of Section 5's preclearance provision is to shift to covered jurisdictions the burden of establishing the legality of new voting practices before they are implemented. Congress enacted Section 5 in response to the "unremitting and ingenious defiance" of the Fifteenth Amendment by state and local officials in certain parts of the country. *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966). Congress found that litigation under prior voting rights statutes had been ineffective in remedying the widespread use of discriminatory voting practices. *Id.* at 314. In particular, it concluded that post-hoc, case-by-case litigation under the prior statutes had proven too onerous for plaintiffs, had allowed inordinate delay by recalcitrant jurisdictions, and (even when successful) had failed to prevent some jurisdictions from adopting new methods of discrimination. *Ibid.*; see also *City of Rome v. United States*, 446 U.S. 156, 173 (1980) (discussing history of evolving discriminatory practices at which Section 5 is aimed); *Beer v. United States*, 425 U.S. 130, 140 (1976) (same).

In response to these systemic problems, Congress incorporated in Section 5 "stringent new remedies" that were designed "to shift the advantage of time and

inertia from the perpetrators of the evil to its victims." *South Carolina v. Katzenbach*, 383 U.S. at 308, 328; *McCain v. Lybrand*, 465 U.S. 236, 244 (1984); *City of Rome v. United States*, 446 U.S. at 182. Section 5 provides that, "unless and until" administrative or judicial preclearance is obtained, a covered jurisdiction such as Monterey County may not "adopt or seek to administer" any change in its voting procedures. 42 U.S.C. 1973c. As a result, unprecleared voting changes are not "effective as law[s]," *Connor v. Waller*, 421 U.S. 656, 656 (1975) (per curiam), and are not enforceable, *Hathorn v. Lovorn*, 457 U.S. 255, 269 (1982). See also *Clark v. Roemer*, 500 U.S. 646, 652-653 (1991); *McCain v. Lybrand*, 465 U.S. 236, 245 (1984); *McDaniel v. Sanchez*, 452 U.S. 130, 146 (1981).

A concomitant of that principle is the rule that "[i]f voting changes subject to [Section] 5 have not been precleared, [Section] 5 plaintiffs are entitled to an injunction prohibiting the [covered jurisdiction] from implementing the changes." *Clark v. Roemer*, 500 U.S. at 652; see also *Lucas v. Townsend*, 486 U.S. 1301, 1305 (1988) (Kennedy, J., in chambers); *Allen v. State Bd. of Elections*, 393 U.S. 544, 572 (1969). The availability of an order enjoining the implementation of unprecleared voting changes is essential to the purpose and function of Section 5. Absent the availability of such relief, the burden of being subjected to presumptively discriminatory voting changes would be improperly shifted back to minority voters. See *McCain v. Lybrand*, 465 U.S. at 245.

The facts of this case illustrate the importance of injunctive relief where preclearance has not been obtained. Although this Court has repeatedly confirmed the applicability of Section 5 to judicial elec-

tions, see *Haith v. Martin*, 618 F. Supp. 410 (E.D. N.C. 1985), aff'd, 477 U.S. 901 (1986); *Brooks v. State Bd. of Elections*, 775 F. Supp. 1470 (N.D. Ga.), aff'd, 498 U.S. 916 (1990); *Clark v. Roemer*, 500 U.S. at 653-654, the County has failed to obtain preclearance of voting changes dating back to at least 1972. The County has admitted that it is unable to meet its burden of proving that the unprecleared consolidation ordinances did not have a retrogressive effect on the electoral strength of Latino voters (see J.S. App. 13). Nonetheless, a lawful, permanent plan has not yet been adopted and precleared. Absent injunctive relief, there is no reason to believe that a lawful, permanent plan will, in fact, be implemented.

2. In its Motion to Dismiss, the State contends that the question whether the consolidation ordinances are unprecleared voting changes subject to Section 5 remained open when the district court ordered that elections proceed under the at-large plan. See Mot. to Dis. 17; see also Sillman Mot. to Dis. 17. That contention is incorrect. The court clearly held that the electoral changes at issue—consolidation ordinances that transformed the County's system of electing municipal judges from a nine-district system to an at-large system—are subject to preclearance, and that the County has never obtained preclearance for those changes. J.S. App. 12; see also *id.* at 2 ("We are faced with a Section 5 violation.").

While the court invited the State to "seek to show that * * * no preclearance requirement is involved," it expressly stated that "[a]t this point the court is not persuaded by the State's position." J.S. App. 2 n.2. In addition, while ordering 1996 elections under the unprecleared plan, the court emphasized that "[t]he injunction remains in effect thereafter pending pre-

clearance of a permanent plan that complies with the Voting Rights Act and state law." *Id.* at 8. In sum, the district court ordered elections under the at-large, consolidated electoral plan, notwithstanding its conclusion that the county-wide ordinances are covered changes that have not received preclearance. *Id.* at 12; see also *id.* at 2.¹⁰

¹⁰ In its unsuccessful Motion for Summary Judgment before the district court, the County contended that the Attorney General's preclearance of a state statute, 1983 Cal. Stat. 4915 (Ch. 1249), implicitly "operated to preclear all prior County Ordinances which had consolidated the districts." *Lopez v. Monterey County*, slip op. 12. The district court rejected that argument, based upon this Court's rulings in *Clark v. Roemer*, 500 U.S. at 656-658 and *McCain v. Lybrand*, 465 U.S. at 249, that administrative preclearance of a statute or ordinance does not preclear prior changes unless they are specifically identified as changes.

In our brief in support of appellant's stay application in this Court, we stated that "the [district] court * * * correctly concluded that the County has never obtained preclearance" for the ordinances at issue in this case. *Lopez v. Monterey County*, No. A-606, Memorandum for the United States as Amicus Curiae at 7-8. Our further review of the State's administrative Section 5 submission of 1983 Cal. Stat. 4915, however, leads us to conclude that the State obtained preclearance for the voting changes implemented by Ordinance No. 2930. See Defendant's Summary Judgment Motion, Exh. A, at 13-34, Exh. B, at 1; Plaintiff's Summary Judgment Motion, Exh. 13. The 1983 state law mentions, but does not require, the consolidation of three Monterey County judicial election districts and provides that, upon consolidation, the consolidated court would have nine judges. Monterey County Ordinance No. 2930 implemented those changes. In our view, in responding to the Justice Department's request for additional information concerning 1983 Cal. Stat. 4915, the State "explicitly included and described" Ordinance No. 2930. See 28 C.F.R. 51.14(2) (1981); 28 C.F.R. 51.15(a) (1987). Thus, the district court

In light of its unequivocal finding that the consolidation ordinances are unprecleared changes covered by Section 5 (and particularly where the County has abandoned any attempt to obtain administrative or judicial preclearance (see J.S. App. 98-99)), the district court erred in ordering elections pursuant to the unprecleared, at-large electoral system. *Clark v. Roemer*, 500 U.S. at 652-653; see also *McDaniel v. Sanchez*, 452 U.S. 130, 146 (1981) (electoral plan devised by covered jurisdiction in response to federal court order is subject to Section 5 preclearance requirement).¹¹

appears to have erred as a factual matter in concluding that the Department of Justice never precleared Ordinance No. 2930. See J.S. App. 13.

That apparent factual error is immaterial, however, to this Court's consideration of the correctness of the district court's November 1, 1995, order, because the State's submission of 1983 Cal. Stat. 4915 did not identify the other County ordinances that consolidated the judicial districts. Specifically, the submission did not reveal that the three judicial districts consolidated by Ordinance No. 2930 had themselves been created by consolidations that occurred after November 1, 1968 and that were not precleared. Because none of the underlying consolidations were ever submitted for preclearance, those consolidations were legally ineffective. See *Clark v. Roemer*, 500 U.S. at 656-658; *McCain v. Lybrand*, 465 U.S. at 249. The consolidations effected by Ordinance No. 2930 are directly dependent upon, and are not severable from, the antecedent, unprecleared consolidations. Thus, regardless of whether the Ordinance No. 2930 changes were precleared, they may not be implemented unless and until all of the underlying changes are precleared. Cf. 28 C.F.R. 51.22(b).

¹¹ The State suggests (State Mot. to Dis. 14 n.19) that this action may be moot because the Attorney General's March 6, 1995, letter preclearing the interim election plan also precleared the municipal court consolidation for all purposes,

3. This Court has recognized a limited exception to Section 5's preclearance requirement where a district court independently crafts a remedial electoral plan. See *McDaniel v. Sanchez*, 452 U.S. 130, 148-150 (1981); *Conner v. Johnson*, 420 U.S. 690 (1971). That

rather than merely for purposes of the interim election plan that was submitted to the Attorney General. That contention is incorrect. The Attorney General's 1995 letter of preclearance was limited to the changes submitted for Section 5 review by the County and actually reviewed by the Attorney General: the single-member, interim remedial district plan and the temporary steps, including district consolidation, necessary for implementation of that interim plan.

When the litigants raised questions regarding the scope of the Attorney General's March 6, 1995, preclearance letter, the United States sent a detailed explanation letter to counsel for appellants and appellees, J.S. App. 28-33 (November 13, 1995 Letter). See *McCain v. Lybrand*, 465 U.S. 236, 255-256 (1984) (according weight to the Department of Justice's written explanation that its initial letter had not precleared a voting change). Where, as here, a submission letter does not expressly seek preclearance of a permanent change, the approval letter cannot be construed as having precleared a permanent change. "The submission of legislation for administrative preclearance under [Section] 5 defines the scope of the preclearance request." *Clark v. Roemer*, 500 U.S. at 656. Further, "any ambiguity in the scope of a preclearance request must be resolved against the submitting authority." *Ibid.*; see also *McCain*, 465 U.S. at 256-257 ("A request for preclearance of certain identified changes in election practices which fails to identify other practices as new ones cannot be considered an adequate submission of the latter practices."). The district court appeared to recognize that the county-wide election system had not been precleared in its order denying appellants' motion for reconsideration. See J.S. App. 25 ("The court's Order Modifying Injunction * * * was not based on any assumption that county-wide elections for municipal court judges had been precleared.").

exception obtains only "where the court, because of exigent circumstances, actually fashions the plan itself instead of relying on a plan presented by a litigant." *McDaniel v. Sanchez*, 452 U.S. at 148-149 (quoting S. Rep. No. 295, 94th Cong., 1st Sess. 18-19 (1975)). Where "a covered jurisdiction submits a proposal reflecting the policy choices * * * of the people—no matter what constraints have limited the choices available to them—the preclearance requirement of the Voting Rights Act is applicable." 452 U.S. at 153. Accord 28 C.F.R. 51.18(a) (Department of Justice regulations for the administration of Section 5) ("Changes affecting voting that are ordered by a federal court are subject to the preclearance requirement of Section 5 to the extent that they reflect the policy choices of the submitting authority.").

Here, there is no question that the county-wide, at-large system under which the court ordered elections to proceed "reflect[ed] the policy choices" of the County; it was the same system that subjected the County to Section 5 liability in the first instance. See J.S. App. 7 ("The court also has considered the fact that a county-wide election system was the legislative choice of the citizens prior to the filing of this lawsuit."). Elections under that system may not proceed absent preclearance.

B. No "Extreme Circumstance" Warranting Implementation Of Unprecleared Electoral Changes Exists In This Case

This Court in *Clark v. Roemer*, 500 U.S. at 654, left open the question whether the existence of an "extreme circumstance" might justify a district court's decision to allow an election to take place

under an unprecleared voting system.¹² As in *Clark*, however, "[n]o such exigency exists here." *Id.* at 655. In this case, as in *Clark*, the covered jurisdiction was on notice for several years that its electoral changes were subject to Section 5's preclearance requirements, and that those changes were the target of a judicial challenge by appellants. See 500 U.S. at 655-656. As we show below, the reasons identified by the district court do not support its refusal to enjoin elections under an unprecleared electoral plan. Moreover, several alternative remedies were available that would have vindicated the purposes of Section 5 while protecting the County's legitimate interest in the administration of its judicial system.

1. In ordering elections under the unprecleared, at-large plan, the district court relied principally on its concern that *Miller v. Johnson*, *supra*, "ha[d] cast substantial doubt upon the constitutionality of extending the duration of the previously ordered emergency, interim plan, as that plan used race as a significant factor in dividing the County into election areas." J.S. App. 3. That concern cannot justify the court's order, however, because the court did not take the steps necessary to determine whether the interim plan actually violated *Miller*.

The Court held in *Miller* that strict judicial scrutiny is required if "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a

¹² The court observed in *Clark* that "[a]n extreme circumstance might be present if a seat's unprecleared status is not drawn to the attention of the state until the eve of the election and there are equitable principles that justify allowing the election to proceed." 500 U.S. at 654-655.

particular [electoral] district. To make this showing, a [party challenging the electoral district under the Equal Protection Clause] must prove that the legislature subordinated traditional race-neutral districting principles * * * to racial considerations." 115 S. Ct. at 2488. A party challenging the district will satisfy this "demanding" threshold standard only if it can "show that the State has relied on race in substantial disregard of customary and traditional districting practices." *Id.* at 2497 (O'Connor, J., concurring); see also *DeWitt v. Wilson*, 856 F. Supp. 1409, 1413 (E.D. Cal. 1994), *aff'd* in relevant part and dismissed in part, 115 S. Ct. 2637 (1995).

Nor does a court's conclusion that a jurisdiction's traditional districting practices have been subordinated to racial considerations end the constitutional inquiry. Last Term, in *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995), the Court expressly rejected "the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" *Id.* at 2117. Rather, "[w]hen race-based action is necessary to further a compelling interest, such action is within constitutional restraints if it satisfies the 'narrow tailoring' test this Court has set out in previous cases." *Ibid.*

Under the foregoing principles, the district court erred in refusing to extend the terms of judges elected under the interim plan simply because the plan "used race as a significant factor in dividing the County into election areas." J.S. App. 3. *Miller* did not hold that the mere consideration of race as a factor in designing electoral districts is impermissible. See 115 S. Ct. at 2490; see also *id.* at 2497 (O'Connor, J., concurring); *DeWitt v. Wilson*, 856 F. Supp. at 1413-1414 (consideration of race in district-

ing process, along with traditional districting principles, is constitutionally permissible). The interim district plan would be unconstitutional under *Miller* only if it subordinated traditional districting principles to race, and then only if it did so without sufficient justification. *Id.* at 2490.

The district court failed to conduct an evidentiary hearing to determine the interim plan's compliance with *Miller*, or to engage in the factual analysis that *Miller* requires. See *Miller v. Johnson*, 115 S. Ct. at 2488-2490 (reviewing district court's extensive factual findings regarding the motivations underlying the creation of the challenged district); *id.* at 2488 ("These principles inform the plaintiff's burden of proof at trial."); see also *Village of Arlington Heights v. Housing Devel. Corp.*, 429 U.S. 252, 266 (1977) ("Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.").¹³ For example, the court did not examine the extent to which the interim plan recognized or subrogated the jurisdiction's traditional districting principles. See *Miller v. Johnson*, 115 S. Ct. at 2488, 2490. Moreover, in its earlier opinion, the court held that the interim plan

¹³ The State's and Intervenor's assertions that the November 1, 1995, status conference constituted such a hearing are incorrect. At that hearing, no party submitted or cited record evidence, no witnesses testified, and no factual findings were made. Nor could the unsupported assertion of one county attorney that race was a predominant motivation in drawing district lines support a determination that the electoral plan is unconstitutional. See *Miller v. Johnson*, 115 S. Ct. at 2490; cf. *Wallace v. Jaffre*, 472 U.S. 38, 65 (1985) (Powell, J., concurring).

"minimally intrudes on state interests and enables the County to maintain its current administrative operation of the municipal courts."¹⁴ J.S. App. 22; accord *id.* at 21. Further, even if the interim plan were held to be subject to strict scrutiny, the district court failed to consider whether the plan was justified by a compelling interest such as compliance with the substantive provisions of the Voting Rights Act. Compare *Miller v. Johnson*, 115 S. Ct. at 2490.

Extension of the terms of the judges elected under the interim plan would have been the least disruptive of the many options available to the district court.¹⁵ Retention of judges from previous elections serves to protect the covered jurisdiction's interest in the stability of its judiciary, and has been employed by other courts faced with similar circumstances under

¹⁴ The court held, for example, that although Article VI, Section 16 of the California Constitution provides that "[j]udges of [municipal] courts shall be elected in their counties or districts," the "process of municipal courts extends throughout the State, Cal. Civ. Proc. Code § 84 (West 1982), and, therefore, the jurisdiction of a municipal court judge extends outside the geographic limits of the judge's electoral district." J.S. App. 21. Further, Art. VI, § 15 of the California Constitution authorizes the Chief Justice to assign municipal court judges to "any court" in any municipal court district. J.S. App. 21. The court found that that provision is frequently employed: "[a] total of 193 blanket assignments [within a county] and 73 reciprocal assignments [between counties] were issued during fiscal year 1992-93." *Ibid.* (quoting *Annual Report of the Judicial Council of California* at 167 (1994)).

¹⁵ The district court had previously employed such a retention remedy when it extended the terms of seven judges elected under the unprecleared plan who, but for the court's injunction, would have stood for reelection in 1994. J.S. App. 16.

Section 5. See, e.g., *Brooks v. State Board of Elections*, 790 F. Supp. 1156, 1159-1161 (S.D. Ga. 1992) (three-judge court) (permitting incumbents in unprecleared judicial offices to "hold over" beyond their terms, and holding that unprecleared, unfilled new positions could not be filled). In light of the availability and suitability of a retention remedy, the district court erred in rejecting that option, absent an adequately supported determination that the plan violated *Miller*.

2. Reversion to the last legally enforceable electoral scheme, pending preclearance, is ordinarily the appropriate remedy for a Section 5 violation. See, e.g., *City of Rome v. United States*, 446 U.S. at 182. If a return to the *status quo ante* was no longer feasible in this case (J.S. App. 15 n.3),¹⁶ the district court erred in failing to consider the option of adapting the pre-existing plan to the present circumstances.¹⁷

3. Finally, this Court's decisions indicate that, where a covered jurisdiction fails to proffer an electoral plan that complies with the dictates of the Voting Rights Act, the district court may itself develop and implement an interim plan. See *Wise v. Lipscomb*, 437 U.S. 535, 542 (1978) ("Pending * * * submission and clearance, if a State's electoral processes are not to be completely frustrated, federal

¹⁶ In its December 20, 1994 order, the court observed that reinstatement of the 1968 judicial election system would require county officials to resolve problems concerning the size of the districts and the number of municipal judges. J.S. App. 15 n.3. The court did not examine, however, the possibility of adapting that plan to avoid those administrative problems.

¹⁷ For example, district lines could be redrawn to address the problem that "several of the districts would be very small" (J.S. App. 15 n.3) under the 1968 electoral scheme.

courts will at times necessarily be drawn further into the reapportionment process and required to devise and implement their own plans.”); see also *Berry v. Doles*, 438 U.S. 190, 193 (1978); *Edge v. Sumter*, 775 F.2d 1509, 1513 (11th Cir. 1985) (per curiam). In such circumstances, the district court should exercise its discretion to “adopt a remedy that * * * implements the mandate of [Section] 5 in the most equitable and practicable manner and with the least offense to its provisions.” *Clark v. Roemer*, 500 U.S. at 660; see also *NAACP v. Hampton*, 470 U.S. at 183. “[T]he court should follow the appropriate Section 5 standards, including the body of administrative and judicial precedents developed in Section 5 cases.” *McDaniel v. Sanchez*, 452 U.S. at 149 (quoting S. Rep. No. 295, 94th Cong., 1st Sess. 18-19 (1975)).

Accordingly, even if the district court correctly concluded that the traditional Section 5 remedies were foreclosed by the circumstances of this case,¹⁸ its obligation was to develop—independently, or in coordination with the parties—an interim plan that comported both with Section 5’s anti-retrogression principle, see *City of Lockhart v. United States*, 460 U.S. 125, 134 (1983), *Beer v. United States*, 425 U.S. 130, 140 (1976), and with the teachings of *Miller v. Johnson*, *supra*.¹⁹

¹⁸ See, e.g., J.S. App. 2 (“The court finds this case to be one with no easy solution.”).

¹⁹ The State suggests (Mot. to Dis. 17, 18) that the district court was precluded from enjoining elections under the unprecleared electoral system because the County had been found to have violated the “procedural,” rather than “substantive,” provisions of Section 5. That suggestion contradicts this Court’s holding that an order enjoining implementation of unprecleared changes is required so long as there exists the

The parties proffered ten proposed electoral plans, some of which may have met these requirements. See J.S. App. 104-107 (Stipulations of Plaintiffs and Monterey County for Hearing to Show Cause). The district court rejected those plans solely because they would have violated one or more state constitutional provisions. As the district court earlier acknowledged (J.S. App. 16-17), however, state laws cannot be permitted to bar implementation of an effective remedy for a federal Voting Rights Act violation. *Katzenbach v. Morgan*, 384 U.S. 641, 646-647 (1966); accord *Reynolds v. Sims*, 377 U.S. 533, 585 (1964).²⁰ “[F]ederal courts are often * * * faced with hard remedial problems in minimizing friction between their remedies and legitimate state policies.” *Connor v. Finch*, 431 U.S. 407, 414 (1977) (quoting *Taylor v. McKeithen*, 407 U.S. 191, 194 (1982)); see also *id.* at 414-416 (“Mississippi’s historic policy against fragmenting counties is insufficient to overcome the strong preference for single-member districting” to remedy a violation of the Voting Rights Act).²¹

“possibility” of discrimination. *NAACP v. Hampton*, 470 U.S. at 181.

²⁰ As discussed above, moreover, the district court found that the State’s asserted interests in coextensive jurisdictional and electoral municipal court districts, and in undivided city districts, are not absolute prescriptions, and that the State itself has observed them inconsistently. See note 12, *supra*.

²¹ The State relies on this Court’s decision in *Houston Lawyer’s Ass’n v. Attorney General of Texas*, 501 U.S. 419 (1991). That case did not hold that federal courts lack the authority to order a remedy that overrides an inconsistent state electoral policy, when necessary to redress an established violation of federal law. Rather, it held that a legitimate,

CONCLUSION

The November 1, 1995, order of the three-judge court should be reversed, and the case remanded with instructions to enjoin enforcement of the consolidation ordinances until such time as they receive administrative or judicial preclearance.

Respectfully submitted.

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uniform state electoral policy may be considered as one of a totality of factors in determining whether a violation of Section 2 of the Voting Rights Act has occurred, and is relevant to the question of an appropriate remedy. *Ibid.*

7
No. 95-1201

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IN THE
Supreme Court of the United States

October Term, 1995

VICKY M. LOPEZ, ET AL., APPELLANTS

v.

MONTEREY COUNTY, CALIFORNIA, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

**BRIEF AMICI CURIAE OF THE AMERICAN CIVIL
LIBERTIES UNION, THE LAWYERS' COMMITTEE
FOR CIVIL RIGHTS UNDER LAW, AND THE
NAACP LEGAL DEFENSE AND EDUCATIONAL
FUND, INC. IN SUPPORT OF APPELLANTS**

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TABLE OF CONTENTS

	Page
INTEREST OF THE AMICI CURIAE	1
STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT	2
The Proceedings Below	4
ARGUMENT	8
I. THE DISTRICT COURT ERRED BY REFUSING TO EXTEND ITS REMEDIAL INTERIM PLAN THAT AVOIDS RETROGRESSION BY INCLUD- ING SINGLE-MEMBER MAJORITY-LATINO DISTRICTS	8
II. THE DISTRICT COURT ERRONEOUSLY READ MILLER V. JOHNSON AS JUSTIFYING ITS DEPARTURE FROM THE PREFERRED REMEDY OF A NON-RETROGRESSIVE PLAN THAT INCLUDES SINGLE-MEMBER DISTRICTS	12
III. THE DISTRICT COURT ERRED BY CONCLUDING THAT CALIFORNIA LAW PROVIDED SUFFICIENT JUSTIFICATION FOR IT TO ALLOW IMPLEMENTATION OF AN AT-LARGE PLAN	16
CONCLUSION	18

TABLE OF AUTHORITIES

CASES	Page(s)
<i>Adarand Constructors, Inc. v. Pena</i> , 115 S. Ct. 2097	13
<i>Allen v. State Bd. of Elections</i> , 393 U.S. 544 (1969)	10
<i>Beer v. United States</i> , 425 U.S. 133 (1976)	9
<i>Brooks v. Winter</i> , 461 U.S. 921 (1983)	9
<i>Chapman v. Meier</i> , 420 U.S. 1 (1975)	10
<i>Chisom v. Roemer</i> , 501 U.S. 380 (1991)	2
<i>Clinton v. Smith</i> , 488 U.S. 988 (1988)	2
<i>Connor v. Finch</i> , 431 U.S. 407 (1977)	2,4,10,16,17
<i>Clark v. Roemer</i> , 500 U.S. 646 (1991)	2,3
<i>Davis v. Bandemer</i> , 478 U.S. 109 (1986)	1
<i>DeWitt v. Wilson</i> , 856 F. Supp. 1409 (E.D. Cal. 1994)	11,14,17
<i>Hastert v. State Bd. of Elecs.</i> , 777 F. Supp. 634 (1991)	13
<i>Holder v. Hall</i> , 114 S. Ct. 2581 (1994)	1
<i>Houston Lawyers Assoc. v. Attorney General of Texas</i> , 501 U.S. 419 (1991)	2
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	Page(s)
<i>King v. State Board of Elections</i> , 1996 WL 13049 (N.D. Ill.)	13
<i>Louisiana v. United States</i> , 380 U.S. 145 (1965)	8
<i>McCain v. Lybrand</i> , 465 U.S. 236 (1984)	1
<i>McDaniel v. Sanchez</i> , 452 U.S. 130 (1981)	9
<i>Miller v. Johnson</i> , 115 S. Ct. 2475 (1995)	passim
<i>NAACP v. Button</i> , 371 U.S. 415 (1963)	2
<i>Rogers v. Lodge</i> , 458 U.S. 613 (1982)	1
<i>Shaw v. Reno</i> , 113 S. Ct. 2816 (1993)	2,11,13,14
<i>Statewide Reapportionment Advisory Comm. v. Theodore</i> , 508 U.S. 968 (1993)	9
<i>Thornburg v. Gingles</i> , 478 U.S. 30 (1986)	2,10
<i>United Jewish Org. v. Carey</i> , 430 U.S. 144 (1977)	2
<i>United States v. Hays</i> , 115 S. Ct. 2431 (1995)	1
<i>Upham v. Seamon</i> , 456 U.S. 37 (1982)	17
<i>Voinovich v. Quilter</i> , 507 U.S. 146 (1993), on remand, 857 F. Supp. 579 (N.D. Ohio 1994)	9
<i>Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n</i> , 443 U.S. 658 (1979) ...	17

	Page(s)
<i>Wilson v. Eu</i> , 1 Cal. 4th 707, 823 P.2d 545 (Special Masters Report)	11,17
<i>Wise v. Lipscomb</i> , 437 U.S. 535 (1978):	10
STATUTES	
Cal. Const. Art. XXI, § 1	17
Voting Rights Act, 42 U.S.C. § 1973	passim
28 C.F.R. 51.4	5

INTEREST OF THE AMICI CURIAE^{1/}

The American Civil Liberties Union (the "ACLU"), the Lawyers' Committee for Civil Rights Under Law (the "Lawyers' Committee") and the NAACP Legal Defense and Educational Fund, Inc. (the "Fund") submit this brief as *amici curiae*, with the consent of the parties, in support of appellants' argument that the three-judge district court erred in lifting its injunction against Monterey County's implementation of an unprecleared, at-large voting plan for the election of municipal judges and in refusing to extend an interim district-based plan that secured minority voting rights. Protection of the voting rights of minorities is an important aspect of the ACLU's, the Lawyers' Committee's, and the Fund's work, as demonstrated by their frequent appearances before this Court in various voting rights cases since the adoption of the Voting Rights Act in 1965.

The ACLU is a nationwide, non-profit, nonpartisan organization with nearly 300,000 members dedicated to defending the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. As part of that commitment, the ACLU has been active in defending the equal right of racial and other minorities to participate in the electoral process. Specifically, the ACLU has provided legal representation to minorities in numerous jurisdictions throughout the country and has frequently participated in voting rights cases before this Court, both as direct counsel, *see, e.g., Miller v. Johnson*, 115 S. Ct. 2475 (1995); *Holder v. Hall*, 114 S. Ct. 2581 (1994); *McCain v. Lybrand*, 465 U.S. 236 (1984); *Rogers v. Lodge*, 458 U.S. 613 (1982), and as *amicus curiae*, *see, e.g., United States v. Hays*, 115 S. Ct. 2431 (1995); *Davis v. Bandemer*, 478 U.S. 109 (1986).

The Lawyers' Committee was formed in 1963 at the request of President Kennedy to involve private attorneys throughout the country in the national effort to assure civil rights to all Americans. The Lawyers' Committee has frequently represented African-American citizens in voting rights cases before this Court, *see,*

^{1/} Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to rule 37.3.

e.g., *Clark v. Roemer*, 500 U.S. 646 (1991); *Clinton v. Smith*, 488 U.S. 988 (1988); *Connor v. Finch*, 431 U.S. 407 (1977), and has appeared as *amicus curiae* in other significant voting rights cases in this Court, see, e.g., *Shaw v. Reno*, 113 S. Ct. 216 (1993); *Miller*, *supra*. The Lawyers' Committee has a particular interest in this case because it involves the continued enforcement of the doctrines set forth in *Clark v. Roemer*, 500 U.S. 646 (1991), and *Connor v. Finch*, 431 U.S. 407 (1977), cases that it litigated.²⁷

The Fund is a non-profit corporation that was established for the purpose of assisting African Americans in securing their constitutional and civil rights. This Court has noted the Fund's "reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation." *NAACP v. Button*, 371 U.S. 415, 422 (1963). The Fund has participated in many of the significant constitutional and statutory voting rights cases in this Court. See, e.g., *United Jewish Org. v. Carey*, 430 U.S. 144 (1977); *Thornburg v. Gingles*, 478 U.S. 30 (1986); *Chisom v. Roemer*, 501 U.S. 380 (1991); *Houston Lawyers Assoc. v. Attorney General of Texas*, 501 U.S. 419 (1991); *Shaw*, *supra*; *Miller*, *supra*.

STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT

This case involves the appeal of a three-judge district court's order that is totally at odds with Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. Section 5 requires that, with respect to covered jurisdictions, the Attorney General or the United States District Court for the District of Columbia preclear any changes affecting voting prior to their implementation. *Id.* *Amici curiae* fully agree with appellants that the three-judge district court (the "district court") radically subverted Section 5's mandate when

²⁷ The Lawyers' Committee for Civil Rights of the San Francisco Bay Area, co-counsel to appellants in this action, is a separate entity from the national Lawyers' Committee for Civil Rights Under Law. Although they are affiliates, the two organizations are separately incorporated and independently operated and governed.

it dissolved an injunction that had prohibited Monterey County, a covered jurisdiction, from implementing an unprecleared, at-large voting plan for the election of municipal judges in the County. See *Clark v. Roemer*, 500 U.S. 646, 652-54 (1991) (requiring that courts enjoin the implementation of covered, unprecleared voting changes absent "extreme" circumstances). The district court's error was compounded by the fact that, prior to its order, Monterey County had sought to obtain preclearance for the plan from the District Court of the District of Columbia but abandoned that effort, stipulating that it was "unable to establish that [the at-large plan] . . . did not have the effect of denying the right to vote to Latinos in Monterey County due to [its] retrogressive effect" (J.A. 126) The district court thus sanctioned the use not only of an unprecleared election plan but one for which Monterey County had stipulated it could not obtain preclearance.

We understand that appellants will fully address the district court's error in dissolving its injunction against Monterey County's implementation of the unprecleared plan and its violation of the standards set forth in *Clark v. Roemer*, *supra*. This brief of *amici curiae* focuses on another egregious error: the district court's unwarranted refusal to extend an interim plan, already in place, that includes two majority-Latino districts and remedies the County's violation of the Voting Rights Act.

The district court failed to meet its remedial obligation because of its fundamental misreading of this Court's decision in *Miller v. Johnson*, 115 S. Ct. 2475 (1995). The district court read *Miller* to constrain a court's authority to remedy a Section 5 violation by implementing any plan that includes majority-minority districts, if race was a "significant factor" in the plan. As a result, the district court departed from well-settled federal law requiring that court-ordered plans be district-based and abdicated its obligation to devise an interim plan that would not cause the retrogression of Latino voting strength. Instead, the district court sanctioned the implementation of the unprecleared at-large plan that the County acknowledged it could not show to be non-retrogressive. (Motion to Dismiss or Affirm of Intervenor Stephen A. Sillman ("Sillman Motion") App. 4a; see J.A. 126)

Nothing in *Miller* justified this perverse result. Race, of course, will be a "significant factor" in *any* plan designed to remedy a violation of Section 5 and to assure adequate protection of a minority group's voting rights. *Miller* held only that a districting plan based "predominantly" on race was subject to strict scrutiny, and even then, that it would be lawful if narrowly tailored to meet a compelling state interest. Moreover, under *Miller*, race will not be deemed the predominant purpose behind a plan absent proof that the plan disregards traditional redistricting principles. In refusing to extend the interim plan, the district court did not attempt to make findings on any of these matters. Indeed, even its conclusion that race was a "significant factor" in the design of the interim plan was reached without holding any evidentiary hearing.

These circumstances require reversal of the district court and make it imperative that this Court clarify that *Miller* is not an obstacle to a lower court's obligation, where it has found a violation of the Voting Rights Act, to implement a properly drawn, district-based remedial plan that protects minority voting rights.

Finally, the district court erroneously believed that a federal court was forbidden from fashioning an appropriate district-based remedial plan if it involved any departure from *state law*. This Court should re-affirm its decision in *Conner v. Finch*, 431 U.S. 407 (1977), that, while a court should be aware of—and attempt to comply with—state law and policies to the extent possible in crafting a remedial plan, state law cannot be an absolute barrier to the effective enforcement of the Voting Rights Act.

The Proceedings Below

On September 6, 1991, appellants filed this action against Monterey County, seeking to enjoin the use of an at-large voting plan for the election of the County's municipal judges. (J.A. 27-35)^{2/} Appellants alleged that the County, which is subject to the

^{2/} Subsequently, the State of California was joined as a necessary party defendant and the Honorable Stephen A. Sillman, Presiding Judge of the
(continued...)

provisions of Section 5 of the Voting Rights Act, *see* 28 C.F.R. 51.4 and App., had failed to obtain preclearance for the ordinances, enacted after November 1, 1968, which established the plan. (J.A. 29-31)^{4/}

On March 31, 1993, the three-judge district court held that Monterey County had implemented the at-large plan in violation of Section 5 and enjoined its use pending preclearance by either the Attorney General or the United States District Court for the District of Columbia. (J.A. 58-59) On August 10, 1993, the County filed an action in the United States District Court for the District of Columbia, seeking the necessary declaration that the plan was not discriminatory. (J.A. 125-26) Eight months later, however, the County dismissed the action, stipulating:

The Board of Supervisors is unable to establish that the Municipal Court Judicial Court Consolidation Ordinances adopted by the County between 1968 and 1983 did not have the effect of denying the right to vote to Latinos in Monterey County due to the retrogressive effect several of these ordinances had on Latino voting strength in Monterey County.

(Sillman Motion App. 4a; *see* J.A. 126)

Subsequently, on December 20, 1994, the court accepted the parties' joint proposal that it implement a special election plan as an interim remedy and ordered that Monterey County hold

^{3/} (...continued)

Monterey County Municipal Court, was joined as a defendant-intervenor. (J.A. 161)

^{4/} As of November 1, 1968, Monterey County had four municipal court judges, elected from two districts, and seven justice court judges, each elected from a separate district. The post-November 1, 1968 ordinances created a consolidated system in which ten municipal judges were elected at-large from the entire county to a single municipal court. (*See* J.A. 125)

elections under the interim plan. The interim plan divided the County into a combination of single-member and multi-member districts, including two compact and contiguous single-member, Latino-majority districts. (J.A. 137) On March 6, 1995, the Department of Justice precleared the interim plan, and the judicial elections proceeded on June 6, 1995. (See J.A. 165)

On September 28, 1995, the court held a status conference to discuss the County's progress in developing a permanent plan, at which time the County and appellants requested that the Court extend the terms of the sitting judges, set to expire in December 1996, to afford the County more time to develop a permanent plan. (J.A. 162, 166)^{2/} The court rejected the request. Rather, on November 1, 1995, the court entered an order "modifying" its two prior injunctions against the use of the unprecleared plan to "allow a county-wide election of municipal court judges in the general election in 1996." (J.A. 167) Although the court stated that its plan was "temporary," it ordered that the elected judges would serve a six-year-term. (*Id.*)

In refusing to extend the judicial terms of the sitting judges, the district court wrote:

Miller v. Johnson, 115 S. Ct. 2475 (1995), has cast substantial doubt upon the constitutionality of extending the duration of the previously ordered emergency, interim plan as that plan used race as a significant factor in dividing the County into election areas. . . .

. . . *Miller* raises substantial doubt as to whether legislative division into race-based districts or election areas can ever withstand constitutional scrutiny.

^{2/} At the conference, the State and Judge Sillman urged the court to dismiss the Section 5 proceedings or alternatively to order county-wide elections. (J.A. 166)

(J.A. 167) The district court reached this conclusion without holding any evidentiary hearing, or otherwise creating a record, to address factual issues related to *Miller*; and the court did not make findings concerning the interim plan or analyze its legality under *Miller*.

Nor did the district court disclose the basis for its conclusion in its opinion. Appellees, in opposing probable jurisdiction of this Court, have relied on an off-hand remark of a County attorney to explain the court's ruling. (See State of California Motion to Dismiss or Affirm ("State Motion") at 6; Sillman Motion at 8) In response to the court's inquiry regarding *Miller*'s effect on the interim plan, he had stated:

The reason is that it was an interim remedy to deal with a specific situation. I will be the first one to admit the reasons for the rationale for the boundaries were in fact race generated. There's no question about it. That was the sole motivation. . . .

But I think that it was also necessary in order to resolve a particular problem that we were in at that time. We were looking at, quite frankly, again, looking at what the status quo ante is. Status quo ante is in a multi-district court system that would have had four minority, or four majority-minority districts in it, and this particular plan came up with a program, that was essentially, that had three majority-minority districts.

(Sillman Motion App. 43a) The district court did not refer to these remarks in its decision. Yet, this ambiguous, unexamined statement by an attorney for the County in the course of a status conference is the *only* "evidence" cited by the State in support of the district court's action.

ARGUMENT

I.

THE DISTRICT COURT ERRED BY REFUSING TO EXTEND ITS REMEDIAL INTERIM PLAN THAT AVOIDS RETROGRESSION BY INCLUDING SINGLE-MEMBER MAJORITY-LATINO DISTRICTS

In March 1993, the district court held that Monterey County had violated Section 5 of the Voting Rights Act by failing to obtain preclearance for the ordinances establishing at-large judicial elections. (J.A. 58–59) That ruling remains in place today. To temporarily remedy its violation of Section 5, Monterey County agreed with plaintiffs on the structure of the interim plan, as well as the boundaries of its districts, and the court ordered implementation of that plan for elections held in June 1995. (J.A. 137) This interim plan included single-member districts, two of which are majority-Latino in eligible voter population. The implementation of that plan was a permissible, appropriate remedy for Monterey County's violation of Section 5. The district court erred by refusing to extend it and by imposing an at-large plan that would cause retrogression of Latino voting strength.

Where a violation of the Voting Rights Act has occurred, the Act compels a remedy for racial discrimination in the electoral process that sufficiently redresses the violation found. *See, e.g., Louisiana v. United States*, 380 U.S. 145, 154 (1965) (“the district court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future”); *Jordan v. Winter*, 604 F. Supp. 807, 814 (N.D. Miss.) (three-judge panel) (remedial plan “must be sufficient to overcome the effects of past discrimination and racial bloc voting and [] provide a fair and equal contest to all voters who may participate in congressional elections”), *aff’d mem. sub nom. Mississippi Republican Exec. Comm. v. Brooks*, 469 U.S. 1002 (1984).

In remedying a Section 5 violation, a court's obligation—at the very least—is to insure that remedial districts do not cause retrogression of the voting rights of protected minorities. *See McDaniel v. Sanchez*, 452 U.S. 130, 149 (1981); *Beer v. United States*, 425 U.S. 133, 141 (1976) (“The purpose of Section 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.”). *See also Statewide Reapportionment Advisory Comm. v. Theodore*, 508 U.S. 968, 968 (1993) (vacating court-ordered plan and remanding “for further consideration in light of the position taken by the Solicitor General,” who argued that district court had not adequately considered whether plan complied with Voting Rights Act) (Brief of Solicitor General at 12–14); *Brooks v. Winter*, 461 U.S. 921, 921 (1983) (vacating court-ordered plan, implemented to remedy Section 5 violation, and remanding for consideration under amended Section 2 of Voting Rights Act).

To the extent necessary to remedy a violation of the Voting Rights Act, including the violation of Section 5, a district court may create majority-minority districts. *See Jordan*, 604 F. Supp. at 814–15 (creating a majority-black district to insure that court-ordered plan, implemented to remedy violation of Section 5, would not unlawfully dilute minority vote); *see also Voinovich v. Quilter*, 507 U.S. 146, 156 (1993) (federal courts may order creation of majority-minority districts if “necessary to remedy a violation of federal law”), *on remand*, 857 F. Supp. 579 (N.D. Ohio 1994) (three-judge panel), *app. pending*, 64 U.S.L.W. 3238 (1995). These districts are a vital means of insuring that an electoral plan does not cause retrogression of minority voting strength and of ensuring that minority voters have an equal opportunity to elect their candidate of choice. *See Voinovich*, 507 U.S. at 154–55.

Further, where a court is called on to impose an electoral plan—whether due to a violation of the Voting Rights Act or otherwise—the preferred remedy is to impose a single-member district voting scheme and not an at-large one. As the Court wrote in *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (citations omitted): “[A] court-drawn plan should prefer single-member districts over

multimember districts, absent persuasive justification to the contrary. We have repeatedly reaffirmed this remedial principle." See also *Chapman v. Meier*, 420 U.S. 1, 26-27 (1975) ("unless there are persuasive justifications, a court-ordered reapportionment plan of a state legislature must avoid use of multimember districts"). The Court's preference for single-member districts reflects its concern that "multimember districting can contribute to voter confusion, make legislative representatives more remote from their constituents, and tend to submerge electoral minorities and overrepresent electoral majorities" *Connor v. Finch*, 431 U.S. 407, 415 (1977); see *Thornburg v. Gingles*, 478 U.S. 30, 47-48 (1986) ("This Court has long recognized that multimember districts and at-large schemes may 'operate to minimize or cancel out the voting strength of racial [minorities in] the voting population.'" (citations omitted); *Allen v. State Bd. of Elections*, 393 U.S. 544, 569 (1969) ("Voters who are members of a racial minority might well be in the majority in one district, but in a decided minority in the County as a whole. [An at-large plan] could therefore nullify their ability to elect the candidate of their choice just as would prohibiting some of them from voting.").

The district court erred when it rejected the extension of the interim plan simply because it included majority-Latino districts. The interim plan provided single-member districts to protect the voting rights of the County's Latino minority, while also retaining a majority-white, multimember voting district. The plan was therefore consistent with this Court's doctrine that remedial plans should include single-member districts that will insure that the votes of minorities are not submerged by those of the majority. See *Wise*, 437 U.S. at 540; *Connor*, 431 U.S. at 415.

The interim plan's creation of single-member districts that included compact and contiguous majority-Latino districts (J.A. 137) was a considered remedy for Monterey County's violation of Section 5. The voting scheme in place on November 1, 1968—before passage of the unprecleared ordinances—was a district-based scheme. As a result, and particularly in light of the residential concentration of Latinos in Monterey County (J.S. App. 95), any subsequent at-large scheme was likely to cause

retrogression of Latino voting strength. Appellants and the County even had stipulated that, if single-member districts were drawn for the municipal court, "at least two geographically compact districts can be created each consisting of more than 50% Latino voter eligible population." (J.S. App. 95)

Further, the Court was entitled—if not required—to rely on the County's stipulation that it was unable to prove that an at-large scheme would not cause retrogression of the voting strength of Latino voters. Indeed, initially the district court had expressed its own appropriate "reluctan[ce] to consider a single district, county-wide election plan . . . in light of the *supported* stipulation that such a plan would be retrogressive in terms of Latino voting strength." (J.A. 130 n.4 (emphasis added)) In fact, the panel of Special Masters that most recently had created a plan for state Assembly districts had divided Monterey County between two districts *only* to avoid retrogression and dilution of Latino voting strength. See *Wilson v. Eu*, 1 Cal. 4th 707, 772, 823 P.2d 545, 582 (Special Masters Report), *adopted*, *id.* at 729-30, 823 P.2d at 559-60 (Cal. 1992). A challenge to the Special Masters' plan brought by white voters under the doctrine of *Shaw v. Reno*, 113 S. Ct. 2816 (1993) was rejected in *DeWitt v. Wilson*, 856 F. Supp. 1409 (E.D. Cal. 1994), and this Court summarily affirmed that decision, 115 S. Ct. 2637 (1995).

The district court here was correct in its initial conclusion that the creation of majority-Latino districts was necessary to prevent retrogression, and its implementation of the interim plan was an appropriate remedy for the County's violation of Section 5. When, on November 1, 1995, the district court revised its initial order and failed to order the implementation of a remedial plan with single-member districts, including majority-Latino districts, it ignored this Court's settled, well-reasoned authority and committed reversible error.

This Court should re-affirm that, where called upon to create remedial election plans, courts generally should create district-based plans, which may include majority-minority districts if necessary to avoid retrogression and dilution of minority voting

strength. Absent such plans, courts would be unable to remedy Section 5 violations, and their "remedies" would merely perpetuate unlawful voting plans. The creation of district-based plans with properly drawn, majority-minority districts works toward fulfilling the Voting Rights Act's promise to protect the ability of minority voters to elect representatives of their choice. To fail to do so, in the face of a violation of the Voting Rights Act, subverts the Act.

II.

THE DISTRICT COURT ERRONEOUSLY READ MILLER V. JOHNSON AS JUSTIFYING ITS DEPARTURE FROM THE PREFERRED REMEDY OF A NON-RETROGRESSIVE PLAN THAT INCLUDES SINGLE-MEMBER DISTRICTS

To restore the at-large election plan and to reject the County's and appellant's request that it extend the interim plan, the district court relied on an erroneous interpretation of this Court's decision in *Miller v. Johnson*, 115 S. Ct. 2475 (1995). The court below was wrong when it wrote that *Miller* "cast doubt upon the constitutionality of extending the duration of the previously ordered emergency, interim plan" and when it suggested that the *Miller* doctrine was "persuasive justification" for departing from the settled remedial standard. (J.A. 167)

In *Miller*, this Court held that, to subject a districting plan to strict scrutiny under the Constitution's Equal Protection Clause, a plaintiff must establish that race was the "predominant" and "overriding" factor in the plan's creation, 115 S. Ct. at 2488-89, by proving that "the legislature subordinated traditional race-neutral districting principles, including compactness, respect for political subdivisions or communities defined by actual shared interests to racial considerations." *Id.* at 2488. As Justice O'Connor observed in *Miller*, "the threshold standard that the Court adopts . . . [is] a demanding one," requiring strict scrutiny of a race-conscious plan only where a jurisdiction has "relied on race in substantial disregard of customary and traditional districting practices." *Id.* at 2497. The *Miller* standard is thus limited to "extreme instances of

gerrymandering." *Id.* Further, under *Miller*, once strict scrutiny is invoked, a district court still should uphold a plan if it is narrowly tailored to serve a compelling state interest. *Id.* at 2490.

There is no basis for the district court's view that *Miller* "raises substantial doubt as to whether legislative division into race-based districts or election areas can ever withstand constitutional scrutiny." (J.A. 167) *Miller* makes clear that even district plans subject to strict scrutiny can survive that review. *Miller*, 115 S. Ct. at 2490-91; see also *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2117 (rejecting the notion that strict scrutiny is "strict in theory, but fatal in fact"); *Shaw v. Reno*, 113 S. Ct. 2816, 2828 (1993) (reserving the question whether "the intentional creation of majority-majority districts, without more, always gives rise to an equal protection claim").

King v. State Board of Elections, 1996 WL 13049 (N.D. Ill.) (three-judge court), is on point. In *King*, the court ruled that Illinois' judicially-created congressional redistricting plan that created a majority-Hispanic district (see *Hastert v. State Bd. of Elecs.*, 777 F. Supp. 634, (1991)) did not violate the Equal Protection Clause. Although the *King* Court found that race was the predominant factor in creating that court-ordered plan and that the plan was subject to strict scrutiny under *Miller*, the court upheld the creation of the majority-Hispanic district (and the plan) because it was narrowly tailored to serve a compelling state interest—remedying a Section 2 violation. *Id.* at *26, *27-28. The court stated: "Where a violation of the Voting Rights Act has been established, a race-based remedy may be appropriate. . . . This compelling interest extends to remedying past or present violations of federal statutes intended to eliminate discrimination." *Id.* at *26.

Further, *Miller* explicitly holds that race-consciousness alone in districting is not sufficient to subject a plan to strict scrutiny review. The *Miller* Court wrote: "Redistricting legislatures will, for example, almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process." 115 S. Ct. at 2488. Here, the district court stated only that race was a "significant factor" in establishing the interim plan.

(J.A. 167) The court thus *did not* find that race was the “predominant” factor in the plan, nor even attempt to determine whether the interim plan “subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to race.” *Miller*, 115 S. Ct. at 2488.

This Court’s summary affirmance of *DeWitt v. Wilson*, 856 F. Supp. 1409, 1413–14 (E.D. Cal. 1994), *aff’d*, 115 S. Ct. 2637 (1995), confirms that the district court misread *Miller*. In *DeWitt*, a three-judge district court held that California’s congressional and legislative redistricting, which included majority-minority districts, was not subject to strict scrutiny under *Shaw v. Reno*, 113 S. Ct. 2816, 2826 (1993). See *DeWitt*, 856 F. Supp. at 1413–14. The *DeWitt* court reasoned that the challenged redistricting act was not subject to strict scrutiny because

[t]he Masters, did not draw district lines based deliberately and solely on race, with arbitrary distortions of district boundaries. The Masters in formulating the redistricting plan, properly looked at race, not as the sole criteria in drawing lines but as one of the many factors to be considered . . . one of which was the consideration of the application of the Voting Rights Act’s objective of assuring that minority voters are not denied the chance effectively to influence the political process.

Id. at 1413–14. As in *DeWitt*, the court’s finding here that race was a “significant” factor in drawing the interim plan did not provide a basis for strict scrutiny review of that plan.^{6/}

^{6/} Indeed, concurring in *Miller*, 115 S. Ct. at 2497, Justice O’Connor emphasized that “[a]pplication of the Court’s standard does not throw into doubt the vast majority of the Nation’s 435 congressional districts . . . even though race may well have been considered in the redistricting process.” Surely, Justice O’Connor’s admonition was not intended to exclude from its reach each of the some 60 majority-minority congressional districts in place at that time. (continued...)

Finally, *Miller* makes clear that intensive factual inquiry is necessary to resolve the questions of whether strict scrutiny applies and, if so, whether a districting plan can nevertheless withstand that review. The district court here compounded its error when it used *Miller* as a justification for its refusal to extend the interim districting plan without holding any evidentiary hearing to investigate the factual issues. The court concluded that “race was a significant factor” even though no party had presented evidence concerning the considerations that went into drawing the interim plan, including evidence concerning compactness, the division of political subdivisions, communities of interest, contiguity, or other principles that Monterey County and California may have traditionally considered in drawing districts.

According to appellees, the court’s conclusion was appropriate in light of the off-the-cuff description of the districting plan made by counsel for the County at the court’s status conference held on September 28, 1995. (See p. 7 *supra*) But, the court did not even credit that statement in its decision.^{7/} Moreover, the statement—which was taken out of context and reflected only the fact that the interim plan was a remedy for the County’s violation of Section 5—was not sufficient to carry a plaintiff’s burden under *Miller*. Nor does it substitute for what should have been appellants’ right to establish *by evidence* that “race-neutral considerations” were not subordinated to the consideration of race in the creation of the interim plan or that the plan also would survive strict scrutiny.

^{6/} (...continued)
sional districts in place at that time.

^{7/} The court’s reliance on the County attorney’s remark would have been at odds with the its refusal to credit the County’s considered *stipulation* that it could not show that the at-large, county-wide election of judges in Monterey County “did not have the effect of denying the right to vote to Latinos in Monterey County due to the retrogressive effect several of these ordinances had on Latino voting strength in Monterey County.” (Sillman Motion App. 43a; see J.A. at 126)

In drawing the hasty conclusion that *Miller* precludes Monterey County's continued use of the interim plan, the district court misread *Miller* as a sweeping indictment of the creation of majority-minority districts. This view would not only cripple judicial authority to create lawful majority-minority districts consistent with the state's traditional districting practices but also would render meaningless *Miller*'s holding that even districts drawn predominantly on the basis of race are lawful if narrowly tailored to serve a compelling state interest. *Miller* does not command this result.

III.

THE DISTRICT COURT ERRED BY CONCLUDING THAT CALIFORNIA LAW PROVIDED SUFFICIENT JUSTIFICATION FOR IT TO ALLOW IMPLEMENTATION OF AN AT-LARGE PLAN

Finally, the district court erroneously deferred to California state law and policy in refusing to extend the interim plan or to otherwise implement a remedial district-based plan. The court's ruling disavowed longstanding principles that govern the involvement of federal courts in the establishment and oversight of local districting plans.

As previously discussed, this Court has held that, in putting in place remedial plans, "single-member districts are to be preferred in court-ordered legislative plans unless the Court can articulate a 'singular combination of unique factors' that justifies a different result." *Connor v. Finch*, 431 U.S. 407, 414-15 (1977) (citing *Mahon v. Howell*, 410 U.S. 315 (1973)). In *Connor*, this Court explicitly rejected adherence to local jurisdictional policies against splitting jurisdictional lines in districting as a sufficient reason "to overcome the strong preference for single-member districting" in court-ordered plans. *Id.* at 415. The *Connor* Court further held "that the latitude in court-ordered plans for departure from the [federal] standard in order to maintain county lines is considerably narrower than that afforded apportionments devised by state legislatures, and that the burden of articulating special reasons

for following such a policy . . . is correspondingly higher." *Id.* at 419-20; see also *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 693-94 (1979) (state laws may be set aside to vindicate federal rights).

The remedial powers of the federal courts under the Voting Rights Act are not limited merely because a remedy may conflict with provisions of state law. When state law provisions can be accommodated in a remedial plan while also curing the violation of federal law, such accommodation generally is required. See *Upham v. Seamon*, 456 U.S. 37, 43 (1982). However, where adherence to state law provisions would prevent adoption of an effective remedy for a federally secured right, deference to state law is unwarranted. See *Connor*, 431 U.S. at 415.

The court here failed to articulate any persuasive features of Monterey County or California state policy that would justify adoption of an at-large voting scheme for the election of judges, particularly where the County itself has stipulated that it could not prove that such a scheme would not cause retrogression of minority voting strength. The California Constitution sets certain redistricting requirements, including "respect" for the "geographical integrity of any city, county, or city and county . . . to the extent possible" Cal. Const. Art. XXI, § 1. This is not a strong state policy. Indeed, the state Constitution provides an exception for the City and County of San Diego, which "may be divided into more than one municipal court district," *id.* Art. VI, § 5(d), and the Supreme Court of the State of California has upheld the drawing of election districts across city lines, where such districts were necessary to comply with federal voting rights law and policy. See *Wilson v. Eu*, 1 Cal. 4th 707, 762, 823 P.2d 545, 575 (Special Masters Report), *adopted, id.* at 729-30, 823 P.2d at 559-60 (Cal. 1992); see also *DeWitt*, 856 F. Supp. at 1415 (rejecting a *Shaw* challenge to California's districting plan adopted in *Wilson*).

The court here erred in doubting whether the interim plan was legally enforceable "because it suspended otherwise applicable provisions of state law . . ." (J.A. 172) This Court should reverse the court's order, with instructions to accommodate state law,

where possible, but not at the expense of enforcing the federal mandate of the Voting Rights Act and the Constitution.

CONCLUSION

The decision of the three-judge district court to allow Monterey County to implement an unprecleared, at-large election plan should be reversed and remanded with appropriate guidance to assure that the district court fulfills its remedial obligations to implement a non-retrogressive plan. The court below failed to do so based on its erroneous interpretation of *Miller v. Johnson*, 115 S. Ct. 2475 (1995), and its unwarranted deference to state law. Accordingly, this Court should instruct the district court and other lower courts on their obligations to design remedial plans that comport with the Voting Rights Act and that include majority-minority districts, where necessary to avoid retrogression or dilution of a minority group's voting strength. Neither *Miller* nor state law are or should be obstacles to such appropriate relief, which is critical to the enforcement of the Voting Rights Act and the Constitution.

Dated: May 31, 1996

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

VICKY M. LOPEZ, CRESCENCIO PADILLA,
WILLIAM A. MELENDEZ AND DAVID SERENA,
Appellants,
v.

MONTEREY COUNTY, CALIFORNIA,
STATE OF CALIFORNIA,
Appellees,
STEPHEN A. SILLMAN,
Intervenor-Appellee.

On Appeal from the United States District Court
for the Northern District of California

**BRIEF OF THE CALIFORNIA JUDGES ASSOCIATION
AS AMICUS CURIAE IN SUPPORT OF APPELLEES**

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13, p. 12

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICUS	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	3
THE VOTING RIGHTS ACT APPLIES ONLY TO JUDICIAL SELECTION PROCEDURES UNDER WHICH JUDGES ARE ELECTED REPRESENTA- TIVES OF THE PEOPLE	3
I. The Voting Rights Act Should Not Apply Where, As In California, Judges Do Not Gain Office By Election	4
II. The Voting Rights Act Should Not Apply Where, As In California, Judges Cannot Act As Representatives	7
CONCLUSION	9

TABLE OF AUTHORITIES

	Page
Cases	
<i>Arcadia v. Ohio Power Co.</i> , 498 U.S. 73 (1990)	3
<i>Blonder-Tongue Labs., Inc. v. University of Ill. Found.</i> , 402 U.S. 313 (1971)	3
<i>Chisom v. Roemer</i> , 501 U.S. 380 (1991)	2, 3, 4, 7
<i>Clark v. Roemer</i> , 500 U.S. 646 (1991)	3
<i>Doan v. Commission on Judicial Performance</i> , 902 P.2d 272 (Cal. 1995)	8
<i>Gregory v. Ashcroft</i> , 501 U.S. 452 (1991)	7
<i>Nipper v. Smith</i> , 39 F.3d 1494 (11th Cir. 1994), cert. denied, 115 S.Ct. 1795 (1995)	8
Constitutional Provisions and Statutes	
Cal. Const. art. VI	5, 6, 8
42 U.S.C. § 1973 (1994)	3
42 U.S.C. § 1973c (1994)	4
Cal. Gov't Code § 12011.5 (West 1992)	5
Miscellaneous Authority	
Alan Abrahamson, <i>Jurist's "Not Qualified" Rating Heats Up Race</i> , Los Angeles Times (Valley ed.), March 14, 1996, at B-5	6
Brief for Petitioners, <i>Chisom v. Roemer</i> , 501 U.S. 380 (1991) (No. 90-757)	7
Cal. Code of Judicial Ethics (1996)	7, 8
Canon 1 cmt.	8
Canon 2	8
Canon 3	8
Canon 4	7
Canon 5	7
40 Cal. Jur. 3d (Rev) Part 1 <i>Judges</i> § 4 (1995)	7
<i>Introduction to the California Merit Plan for Judicial Selection</i> , 43 State Bar J. 156 (1968)	5, 6

Dixie K. Knoebel, <i>The Voting Rights Act: Are Its Provisions Applicable to the Judiciary?</i> , 13 State Ct. J. 24 (1989)	5
S. Rep. No. 417, 97th Cong., 2d Sess. (1982), reprinted in 1992 U.S.C.C.A.N. 177	4
<i>Winning Judge Wallerstein Demurred in Courting the Electorate</i> , Los Angeles Times (Valley ed.), June 14, 1994, at B-5	6
Glenn R. Winters, <i>Selection of Judges — An Historical Introduction</i> , 44 Tex. L. Rev. 1081 (1966)	5
2 B.E. Witkin, <i>California Procedure (Courts)</i> § 2 (3d ed. 1985)	6

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**BRIEF OF THE CALIFORNIA JUDGES ASSOCIATION
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INTEREST OF THE AMICUS¹

The California Judges Association is the professional association of the California state judiciary. Its mission includes maintaining the integrity of the California judiciary as an

¹ Counsel for appellants, appellees, and intervenor have consented to the filing of this brief *amicus curiae*. Their consents are on file with the Clerk of the Court.

independent branch of the state government and providing leadership and advocacy on matters affecting the courts. The Association takes no position on the underlying merits of this case. The Association's sole concern is that the Voting Rights Act not be applied at all to California's judicial selection system, which does not ordinarily involve either "elections" or the choice of "representatives" in any commonly understood sense of those terms. California has made the considered judgment that the state judiciary, unlike the legislative and executive branches of the state government, is to be shielded from the pressures of elective politics. The Voting Rights Act was not designed to apply to judicial selection in California and other states that have made that judgment.

SUMMARY OF THE ARGUMENT

This Court held in *Chisom v. Roemer*, 501 U.S. 380, 400 (1991), that the Voting Rights Act applies to state judicial elections in which would-be judges "vie for popular support just as other political candidates." The Voting Rights Act cannot properly be applied to California's judicial selection system, however, because California judges do not reach office by election and do not serve as representatives of the popular will.

Virtually all California judges are initially appointed by the Governor, after review of their qualifications by a committee of the State Bar, to seats that are either vacant or soon to become vacant. The judges do come before the voters every six to twelve years. But these elections are essentially confirmatory; they are non-partisan, rarely contested (indeed, appellate judges never face an opponent), and even more rarely result in the defeat of an incumbent judge. It is, therefore, gubernatorial appointment, not popular election, that determines the composition of the California judiciary. Moreover, California has taken care to assure that judges are, as the Court put it in *Chisom*, "indifferent to popular opinion." 501 U.S. at 401. They are bound to act independently of popular sentiment, to forgo partisan political activity, and to refrain from taking public positions on matters that may come

before them. They are not, therefore, "representatives" of their constituencies within the meaning of the Voting Rights Act.²

ARGUMENT

THE VOTING RIGHTS ACT APPLIES ONLY TO JUDICIAL SELECTION PROCEDURES UNDER WHICH JUDGES ARE ELECTED REPRESENTATIVES OF THE PEOPLE

The Voting Rights Act applies to judicial selection procedures that result in a denial or an abridgement of "the right . . . to vote" — that is, that deprive citizens of the opportunity "to participate in the political process" and "to elect representatives of their choice." 42 U.S.C. § 1973(a), (b) (1994); see *Chisom*, 501 U.S. at 397-98, 404 (applying Section 2 of Voting Rights Act to judicial elections); *Clark v. Roemer*, 500 U.S. 646 (1991) (applying Section 5 of Voting Rights Act to judicial elections). Section 2 allows citizens to challenge any "standard, practice, or procedure" that may deny or abridge the right to vote. 42 U.S.C. § 1973. Section 5 requires a covered jurisdiction to obtain judicial or administrative pre-clearance before enforcing a new "standard, practice, or procedure" to ensure that the change

² The applicability of the Voting Rights Act to the California judicial selection process has not been raised here by the parties. It is nonetheless permissible, of course, for the Court to address "important questions not raised by the parties," *Blonder-Tongue Labs., Inc. v. University of Ill. Found.*, 402 U.S. 313, 320 n.6 (1971), especially when they are "antecedent to" and "ultimately dispositive of" the questions that the parties have raised. *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 77 (1990). In the event that the Court chooses not to reach this threshold question, however, *amicus* respectfully requests that the Court at least not foreclose litigants, in this case or future cases, from challenging the applicability of the Voting Rights Act to judicial selection systems, like California's, that are characterized by gubernatorial appointment followed by an election that is, by law or by practice, essentially confirmatory.

does not have the purpose or effect of denying or abridging the right to vote. 42 U.S.C. § 1973c (1994).³

For two reasons, the California judicial selection system does not implicate "the right to vote": *first*, because judges are not, as a practical matter, chosen by election and, *second*, because judges do not, and cannot under state law, serve as representatives of the popular will.

I. The Voting Rights Act Should Not Apply Where, As In California, Judges Do Not Gain Office By Election

As this Court has recognized, the Voting Rights Act is concerned exclusively with the selection of officials through "representative, popular elections." *Chisom*, 501 U.S. at 399. Accordingly, if a state's judges almost exclusively reach office by means other than "popular election," the Voting Rights Act should not apply.

Indeed, the Court acknowledged in *Chisom* that the Voting Rights Act would not apply to a judicial selection system that, like the federal system, provides for judges to be appointed by the chief executive with confirmation by the legislature. See 501 U.S. at 401 (observing that "Louisiana could, of course exclude its judiciary from the coverage of the Voting Rights Act by changing to a system in which judges are appointed"). The judicial selection system in California is not appreciably different, as a practical matter, from a purely appointive system.

³ The standard for whether the Voting Rights Act applies to a judicial selection system should be the same under both Section 2 and Section 5. It would be "anomalous" for a judicial selection system to be acceptable if preexisting, but unacceptable if proposed for the future, or vice versa. *Chisom*, 501 U.S. at 401-02 (concluding that Congress intended that the two sections have comparable reach); see also S. Rep. No. 417, 97th Cong., 2d Sess. 2, 12 n.31 (1982), reprinted in 1992 U.S.C.C.A.N. 177, 178, 189 n.31 ("[I]n light of the amendment to section 2, it is intended that a section 5 objection also follow if a new voting procedure itself so discriminates as to violate section 2.").

More than ninety percent of all California judges reach the bench by gubernatorial appointment to fill positions that are vacant or about to become vacant. See Dixie K. Knoebel, *The Voting Rights Act: Are Its Provisions Applicable to the Judiciary?*, 13 State Ct. J. 24, 26 (1989). "These vacancies occur all the time as judges retire, die, or leave the bench, or as the Legislature creates new judgeships." *Introduction to the California Merit Plan for Judicial Selection*, 43 State Bar J. 156, 156-57 (1968).

The appointment process is designed to reflect merit rather than partisan political considerations. The Governor is required by law to submit the names of all potential appointees to the Committee on Judicial Nominees Evaluation of the State Bar "for evaluation of their judicial qualifications." Cal. Gov't Code § 12011.5(a) (West 1992). The Committee prepares a confidential report assessing whether the individual is "exceptionally well-qualified, well-qualified, qualified, or not qualified." *Id.* § 12011.5(c). The Committee is to consider such factors as the individual's "legal experience," "judicial temperament," "ability," "industry," "honesty," and "objectivity." *Id.* § 12011.5(d). In addition, the Governor's nominees to the Supreme Court and the courts of appeal must be confirmed by the Commission on Judicial Appointments, which is composed of the Chief Justice, the Attorney General, and a senior presiding justice of the Courts of Appeal. Cal. Const. art. VI, § 7. California's judicial selection system thus constitutes a modified version of the so-called "Missouri Plan," which was proposed by the American Judicature Society in the early part of this century for the merit selection and retention of judges. See, e.g., Glenn R. Winters, *Selection of Judges — An Historical Introduction*, 44 Tex. L. Rev. 1081, 1083-85 (1966).

To be sure, California judges, once appointed, are required to stand for office — every twelve years for appellate judges, and every six years for lower court judges. But these are not "popular elections" in any true sense of the word. Appellate judges are subject only to retention elections, where they "run on their records with no opposition, the ballot merely presenting the

question whether the candidate 'shall be elected.'" 2 B.E. Witkin, *California Procedure (Courts)* § 2 (3d ed. 1985). Superior and municipal court judges may, in theory, face an opposing candidate. But they rarely ever do. According to one observer, "[c]ontested races are so rare that 'it's like being struck by lightning.'" *Winning Judge Wallerstein Demurred in Courting the Electorate*, Los Angeles Times (Valley ed.), June 14, 1994, at B-5 (quoting chairman of Los Angeles County Bar Association's Judicial Evaluation Committee). For example, of the seventy-four judges on the Los Angeles Superior Court whose terms were to expire this year, only four faced any opposition at all. Alan Abrahamson, *Jurist's "Not Qualified" Rating Heats Up Race*, Los Angeles Times (Valley ed.), March 14, 1996, at B-5. The unopposed incumbents did not even appear on the ballot. *Id.*; see Cal. Const. art VI § 16(b) (authorizing such procedure). Moreover, even in a contested judicial election, the sitting judge almost always wins. See, e.g., Abrahamson, *supra* ("In the 1990s in Los Angeles County, not one incumbent Superior Court judge has lost an election. In the '80s, two lost — and one of them was literally on his deathbed.").

One commentator has observed that California appellate judges, because they are initially appointed to office and are subject only to occasional retention elections, "in effect are given the opportunity of securing life tenure." 2 B.E. Witkin, *California Procedure (Courts)* § 2. The same may be said of California trial judges, who are likewise appointed, who are rarely subject to any contested election, and who are even more rarely turned out of office. See *Introduction to the California Merit Plan for Judicial Selection*, 43 State Bar J. at 156-57 (because trial judges are initially appointed and subsequently "rarely opposed on the ballot," their "appointment, in effect, is likely to become one for life"). California judges neither gain office, nor remain in office, as a result of a "popular election."

The process by which these judges are selected should not, therefore, be subject to the Voting Rights Act.⁴

II. The Voting Rights Act Should Not Apply Where, As In California, Judges Cannot Act As Representatives

There is an additional reason why California's judicial selection system should not be subject to the Voting Rights Act. California has carefully crafted that system to ensure that judges neither act, nor are perceived to act, in response to the popular will. They are not, therefore, "representatives" within the meaning of the Voting Rights Act.

California judges, unlike the Louisiana judges in *Chisom*, are not "compel[led] to vie for popular support just as other political candidates." 501 U.S. at 400. Quite the contrary. A judicial election — in the unlikely event that one occurs — is strictly non-partisan.⁵ A judge cannot commit or appear to commit to positions with respect to cases, controversies, or issues that could come before the courts. Cal. Code of Judicial Ethics Canon 5A (1996). Judges are ineligible for any other public employment or public office, so as to prevent them from being partisan or even appearing so. Canon 4C; 40 Cal. Jur. 3d (Rev) Part 1 *Judges* § 4, at 421 (1995). Nor can judges hold office in any political organization. Canon 5B. A failure to comply with these requirements can lead to the judge's removal from office. Cal.

⁴It has been suggested in other contexts that judges should not be considered to be "elected" if they were initially appointed to office and then subject only to retention elections. See *Gregory v. Ashcroft*, 501 U.S. 452, 481-82 (1991) (White, J., dissenting) (assuming that judges appointed by Governor and subject to retention elections were appointed rather than elected within the meaning of the Age Discrimination in Employment Act); see also *id.* at 467 (O'Connor, J.) (refraining from addressing this question).

⁵In contrast, while the Louisiana judges in *Chisom* competed in an "open primary," their political party affiliations were listed on the ballot. See Brief for Petitioners at 5, *Chisom v. Roemer*, 501 U.S. 380 (1991) (No. 90-757).

Const. art. VI, §§ 8, 18(b)-(m); *Doan v. Commission on Judicial Performance*, 902 P.2d 272, 278-79 (Cal. 1995).

Not only are judges prohibited while seeking office from acting like "other political candidates"; they are also prohibited while in office from acting like other political officials. Judges are obligated to remain scrupulously independent and impartial, dispensing justice "without fear or favor" as to any person. See Canon 1 cmt. Judges must be "faithful to the law regardless of partisan interests, public clamor, or fear of criticism," and must not "manifest bias or prejudice," including prejudice based on race or national origin, in performing judicial duties. Canons 3B(2), 3B(5). Judges cannot allow political or other relationships to influence their official conduct or judgment. Canon 2B. Simply put, judges are prohibited from acting as "representatives," in any true sense of the term.

In sum, California's judicial selection system does not implicate "the right to vote" protected by the Voting Rights Act. California judges do not, except in the rarest of circumstances, gain or retain office by contested election. Moreover, when in office, California judges do not serve as representatives of the people, and, in fact, are prohibited by state law from doing so. The Voting Rights Act was never intended to apply to this sort of judicial selection system.⁶

⁶The Eleventh Circuit recently misconstrued *Chisom* and applied the Voting Rights Act to Florida's appointment-based judicial selection system, without assessing the roles of appointment, uncontested subsequent elections, and other indicia of whether Florida judges are, in fact, selected by election or are representatives of a constituency. See *Nipper v. Smith*, 39 F.3d 1494, 1529-30 (11th Cir. 1994) (recognizing that "it is equally wrong to say that section 2 covers all judicial selections as it is to say it covers none," but failing to assess whether the Act should have applied to Florida's judicial selection system, a modified Missouri Plan), cert. denied, 114 S. Ct. 1795 (1995). The court misinterpreted *Chisom* to suggest that coverage by the Act turns solely on whether a judicial selection system contains any election component.

CONCLUSION

The decision below should be vacated and the district court should be directed to dismiss this case on the ground that the Voting Rights Act does not apply to California's judicial selection system.

Respectfully submitted,

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**In the
Supreme Court of the United States
October Term, 1995**

**VICKY M. LOPEZ, CRESCENCIO PADILLA,
WILLIAM A. MELENDEZ, and DAVID SERENA,**
Appellants,

v.

**MONTEREY COUNTY, CALIFORNIA, and
STATE OF CALIFORNIA,**
Appellees,

and

STEVEN A. SILLMAN,
Intervenor-Appellee.

**On Appeal from the United States District Court
for the Northern District of California**

**BRIEF AMICUS CURIAE OF PACIFIC LEGAL
FOUNDATION IN SUPPORT OF APPELLEES**

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES CITED	ii
IDENTITY AND INTEREST OF AMICUS CURIAE	1
OPINION BELOW	3
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	6
ARGUMENT	7
I. JUDGES HAVE A SPECIAL ROLE DISTINCT FROM THE LEGISLATIVE OR EXECUTIVE BRANCHES	7
A. Judges Must Be Impartial Decision Makers, Accountable to No Individual or Special Interest Group	9
B. The Judiciary Performs an Antimajoritarian Role	14
II. EXPANDING THE BREADTH OF SECTION 5 PRECLEARANCE PROCEEDINGS VIOLATES THE TENTH AMENDMENT	18
CONCLUSION	22

TABLE OF AUTHORTIES CITED

	Page
Baker v. Carr, 369 U.S. 186 (1962)	7
Beer v. United States, 425 U.S. 130 (1976)	21
Betar v. DeHavilland Aircraft of Canada, Ltd., 603 F.2d 30 (7th Cir. 1979), cert. denied, 444 U.S. 1098, reh'g denied, 445 U.S. 947 (1980)	11
Black and White Taxicab and Transfer Co. v. Brown and Yellow Taxicab and Transfer Co., 276 U.S. 518 (1928)	12
Boyd v. Nebraska, ex rel. Thayer, 143 U.S. 135 (1892)	18
Bush v. Vera, 1996 WL 315857 (June 13, 1996)	2
Chisom v. Roemer, 501 U.S. 380 (1991)	2,8-9,16,21
Clark v. Roemer, 777 F. Supp. 471 (M.D. La. 1991), appeal dismissed, 958 F.2d 614 (5th Cir. 1992)	13
Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938)	12
Gregory v. Ashcroft, 501 U.S. 452 (1991)	18-19

	Page
Hays v. Louisiana, 515 U.S. ___, 115 S. Ct. 2431 (1995)	2
Hanna v. Plumer, 380 U.S. 460 (1965)	12
Houston Lawyers' Association v. Attorney General of Texas, 501 U.S. 419 (1991)	2,10-11
In re Duncan, 139 U.S. 449 (1891)	19
League of United Latin American Citizens Council v. Attorney General of Texas, 914 F.2d 620 (5th Cir. 1990)	11
League of United Latin American Citizens v. Clements, 986 F.2d 728 (5th Cir.), rev'd, 999 F.2d 831 (5th Cir. 1993), cert. denied, __ U.S. __, 114 S. Ct. 878 (1994)	13
Magnolia Bar Association v. Lee, 793 F. Supp. 1386 (S.D. Miss. 1992), aff'd, 994 F.2d 1143 (5th Cir.), cert. denied, __ U.S. __, 114 S. Ct. 555 (1993)	13,18
Martin v. Mabus, 700 F. Supp. 327 (S.D. Miss. 1988)	8
Miller v. Johnson, __ U.S. __, 115 S. Ct. 2475 (1995)	6,10,20,22

	Page
New York v. United States, 505 U.S. 144 (1992)	19,21
Nipper v. Chiles, 795 F. Supp. 1525 (M.D. Fla. 1992), rev'd sub nom., Nipper v. Smith, 1 F.3d 1171 (11th Cir. 1993), vacated, 17 F.3d 1352 (11th Cir. 1994)	13
Nipper v. Smith, 39 F.3d 1494 (11th Cir. 1994)	12
O'Brien v. Avco Corp., 425 F.2d 1030 (2d Cir. 1969)	12
Pease v. Peck, 59 U.S. (18 How.) 595 (1855)	11
Reynolds v. Sims, 377 U.S. 533 (1964)	7
Shaw v. Hunt, 1996 WL 315870 (June 13, 1996)	2,22
Shaw v. Reno, 509 U.S. 630, 113 S. Ct. 2816 (1993)	10
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Southern Christian Leadership Conference v. Evans, 785 F. Supp. 1469 (M.D. Ala. 1992), aff'd, 56 F.3d 1281 (11th Cir. 1995), cert. denied, ___ U.S. ___, 64 U.S.L.W. 3453 (Jan. 8, 1996)	13

	Page
Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842)	12
Taylor v. Beckham, 178 U.S. 548 (1900)	18
Thornburg v. Gingles, 478 U.S. 30 (1986)	23
United States v. Board of Commissioners, 435 U.S. 110 (1978)	21
Wells v. Edwards, 409 U.S. 1095 (1973)	8

RULE

Supreme Court Rule 37	1
---------------------------------	---

STATUTES

28 U.S.C. § 1441	11-12
42 U.S.C. § 1973(a)	21
§ 2021(b)	19

CALIFORNIA CONSTITUTION

Article III, § 3	14
Article IV	14
Article VI, § 5(a)	5
§ 16(b)	4-5,17

	Page
UNITED STATES CONSTITUTION	
Article I	14
Article III	14
Article IV, § 4	20
Tenth Amendment	18,23
Fourteenth Amendment	13,17,21-22
MISCELLANEOUS	
Canon, Judicial Election and Appointment at the State Level: Commentary on State Selection of Judges, 77 Ky. L.J. 747 (1989)	17
Chapman, Judicial Roulette, Alternatives to Single-Member Districts as a Legal and Political Solution to Voting-Rights Challenges to At-Large Judicial Elections, 48 S.M.U. L. Rev. 457 (1995)	8,14
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	Page
Montesquieu, Spirit of Laws, Vol. 1 (1750)	15
Saks, Redemption or Exemption?: Racial Discrimination in Judicial Elections Under the Voting Rights Act, 66 Chi.-Kent L. Rev. 245 (1990)	16-17
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The Federalist No. 78, at 465 (A. Hamilton) (C. Rossiter ed. 1961)	15-16
Weber, The Voting Rights Act and Judicial Elections Litigations: The Defendant States' Perspective, 73 Judicature 85 (1989)	8

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**On Appeal from the United States District Court
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**BRIEF AMICUS CURIAE OF PACIFIC LEGAL
FOUNDATION IN SUPPORT OF APPELLEES**

IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of appellees, Monterey County, California, and the State of California. All parties have consented to the

filing of this brief. The letters of consent have been lodged with the Clerk of this Court.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, many of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

Pacific Legal Foundation is submitting this brief because it believes its public policy perspective and litigation experience in the voting rights arena will provide an additional viewpoint with respect to the issues presented. PLF attorneys have participated in numerous other cases in the voting rights context before this Court including *Bush v. Vera*, 1996 WL 315857 (June 13, 1996); *Shaw v. Hunt*, 1996 WL 315870 (June 13, 1996); *Hays v. Louisiana*, 515 U.S. ___, 115 S. Ct. 2431 (1995); *Chisom v. Roemer*, 501 U.S. 380 (1991); and *Houston Lawyers' Association v. Attorney General of Texas*, 501 U.S. 419 (1991).

PLF believes that to the extent the Voting Rights Act applies to judges, it should be very narrowly construed. Judges are not representatives in the sense that legislators or executives represent those who elect them. Blurring this distinction fosters distrust in the judiciary; a calamity in a society based on the rule of law.¹

¹ In its role as amicus curiae, Pacific Legal Foundation focusses on the broader, philosophical aspects which should
(continued...)

OPINION BELOW

The November 1, 1995, opinion of the three-judge District Court in *Lopez v. Monterey County, California*, finding that elections for county judges temporarily must be held at-large to avoid unconstitutional racial gerrymandering is not reported. The decision is included in the Joint Appendix (JA) at 165-73.

STATEMENT OF THE CASE

Prior to 1968, Monterey County, California (County), had two Municipal and seven Justice Court districts. JA at 125. Between 1968 and 1983, those districts were consolidated to provide for one Municipal Court district with judges elected at-large from the entire county. *Id.* The consolidation ordinances were subject to review under Section 5 of the Voting Rights Act and Latino residents (led by Vicky Lopez) of the County filed a Section 5 enforcement action seeking declaratory and injunctive relief requiring the County to seek preclearance of the ordinances before enforcing them further. *Id.*

On March 31, 1993, the United States District Court for the Northern District of California (three-judge panel) found that the ordinances did require preclearance and that

¹ (...continued)
form the framework of the instant case rather than the more specific legal questions which are certain to be briefed at length by the parties.

the ordinances could not be enforced without preclearance. *Id.* In response to the court's order, the County sought after-the-fact preclearance in the United States District Court for the District of Columbia. *Id.* The County then stipulated that the consolidations ordinance did deny the right to vote to Latinos due to the retrogressive effect several of these ordinances had on Latino voting strength in Monterey County. JA at 126.

Monterey County and Lopez came up with two plans for the election of Municipal Court judges. JA at 126-27. The first plan created seven election areas in which only the residents could vote. JA at 126. The areas were to be used solely for election purposes and there would remain only one county-wide Municipal Court district for all other purposes. *Id.* However, this plan conflicted with Article VI, Section 16(b),² of the California Constitution by removing the linkage between a judge's electoral and jurisdictional bases. *Id.* Nonetheless, the parties asked the court to authorize the County to adopt the plan and upon such authorization, the County said it would seek preclearance. *Id.* The State of California intervened and objected to the issuance of an order authorizing the plan. *Id.* The District Court did not approve the plan because it was not satisfied that a plan necessarily had to conflict with the California Constitution to comply with the Voting Rights Act. *Id.* The second plan prepared by the parties created four districts and similarly violated Article VI, Section 16(b), of the California Constitution. JA at 127. Again, the District Court ruled that the County must submit for preclearance "an election plan

² In pertinent part, Article VI, Section 16(b), of the California Constitution states: "Judges of other [nonappellate] courts shall be elected in their counties or districts at general elections."

that complied with the Voting Rights Act and all applicable provisions of the California Constitution and state law, or show cause why it could not do so." *Id.*

In a hearing to show cause why it kept submitting plans that create election districts that violate Article VI, Section 16(b), of the California Constitution, the County explained it could not submit a plan for preclearance that does not conflict with at least one state law and still comply with the Voting Rights Act. *Id.* Thereafter, the court enjoined Monterey County from holding elections for Municipal Court judges pending adoption and preclearance of a plan for their election. *Id.* The court ordered the County to take the necessary steps to obtain changes in existing state law and county ordinances to effectuate such a plan. *Id.* Following the court's order, the County sought to secure passage of an amendment to the California Constitution regarding the configuration of Municipal Court districts in Monterey County. JA at 128. These efforts were unsuccessful. *Id.* Lopez and the County then asked the court to allow elections to take place under the four-district plan. *Id.* As an alternative, they asked the court to authorize the County to implement a plan which would include districts that split cities. *Id.* A plan splitting cities also violates Article VI, Section 5(a), of the California Constitution, which prohibits the division of any municipality into two or more Municipal Court districts.

The court implemented the four-district plan as an emergency, interim plan, with the restriction that the terms served by the judges elected pursuant to that plan shall expire on January 1, 1997. JA at 137. The court expressed the expectation that the County and the state would work out the appropriate legislative solution by then. *Id.*

The special election occurred on June 6, 1995. JA at 165. Subsequently, this Court decided *Miller v. Johnson*, __ U.S. __, 115 S. Ct. 2475 (1995), which the District Court correctly found cast serious doubt on the validity of the District Court's interim plan. JA at 167. *Miller*, a racial gerrymandering case relating to Georgia's congressional districts, raised substantial doubt that legislative division of election district based predominantly on race can withstand constitutional scrutiny. *Id.* at 2486. Given this intervening clarification of the law, the District Court issued a new order on November 1, 1995. JA at 165-73. The new order rescinded the interim plan and held that judges will be elected in 1996 by the county-wide at-large system in place before the litigation commenced. JA at 173. The State of California joined the litigation as an indispensable party on the basis of its argument that the County was only administering a *state* statute and, therefore, the failure to preclear the consolidation ordinances is of no significance. *Id.* Meanwhile, the parties were ordered to come up with a permanent election plan. *Id.*

Lopez appealed the decision rescinding the emergency interim plan to this Court, which noted probable jurisdiction on April 1, 1996.

SUMMARY OF ARGUMENT

The linchpin of the American judiciary is the impartiality of its judges. Litigants must abide by decisions whether they agree with them or not. By requiring judges to "reflect," "be responsive to," or "represent" a discrete constituency, the impartiality that is crucial to the administration of justice is lost. The smaller the constituency, the greater the pressure on judges to conform to local concerns.

Far from representing a particular group of people, the judiciary is meant to be the antimajoritarian branch of government.

Equating the judiciary with the truly representative branches of government destroys the check the judiciary has over those branches. Subdistricting judgeships would devastate the judicial election systems in California--in which no intentional discrimination has occurred. Moreover, such micromanagement by the federal government in the absence of discriminatory conduct by the state infringes on the state sovereignty as protected by the Tenth Amendment. Because the court below determined that the racially based subdivisions for judicial elections contravened the traditional districting principles set forth in the California Constitution, the court correctly reinstalled the at-large elections until such time as the state, County, and appellants can devise a plan which complies with both the Voting Rights Act and state districting requirements.

ARGUMENT

I

JUDGES HAVE A SPECIAL ROLE DISTINCT FROM THE LEGISLATIVE OR EXECUTIVE BRANCHES

Because judges and legislators serve different functions, this Court recognizes that judicial and legislative elections raise different concerns. For example, while this Court permits virtually no deviation from the one-person, one-vote principle in legislative elections (*Reynolds v. Sims*, 377 U.S. 533 (1964); *Baker v. Carr*, 369 U.S. 186 (1962)), there is far greater leeway in drawing judicial electoral

boundaries to facilitate judicial administration (*Wells v. Edwards*, 409 U.S. 1095 (1973)).

Judicial elections are unique compared to elections for legislative and administrative offices. Not only do most judicial candidates fail to run aggressive or partisan campaigns, some judges do not campaign at all in elections. *Chisom v. Roemer*, 501 U.S. at 400; *Martin v. Mabus*, 700 F. Supp. 327, 332 (S.D. Miss. 1988). Judicial elections are distinguished by lower levels of turnout and voter roll-off, less competition and greater reliance by the voters on yfactors such as incumbency, previous judicial experience, and party affiliation³ in making choices among competing candidates. Weber, *The Voting Rights Act and Judicial Elections Litigations: The Defendant States' Perspective*, 73 JUDICATURE 85, 86 (1989). Thus, this Court should exercise caution in reaching conclusions about voter polarization and dilution in judicial elections based on past experience with elections for legislative and executive offices.

As discussed below, the very dramatic distinctions between the judicial branch of government and the legislative branch must inform any application of the Voting Rights Act to judicial elections.

³ See Chapman, *Judicial Roulette, Alternatives to Single-Member Districts as a Legal and Political Solution to Voting-Rights Challenges to At-Large Judicial Elections*, 48 S.M.U. L. REV. 457, 479-80 (1995), for extreme examples of partisanship in state judicial elections.

A. Judges Must Be Impartial Decision Makers, Accountable to No Individual or Special Interest Group

By dividing a county into subdistricts, the District Court would dramatically alter elected judges' independence and appearance of impartiality. Rather than enjoying the independence that accompanies accountability to the entire electorate, judges would be rendered beholden to a small portion of those appearing in court. Rather than being free to eradicate a nuisance in their own neighborhoods, judges may be pressured to allow that nuisance to continue if they intend to remain in office.⁴ The American judicial system relies on citizens to abide to court rulings, whether or not they agree or disagree with such rulings. It is therefore of fundamental importance that the judges handing down the rulings be perceived as being fair and unbiased.

Electing state district judges from single-member districts would destroy the integrity of the unit. Decision making would become fragmented along the same lines as the districts into which the unit is carved. The judge would not reflect values of the whole community. Judges who appear to favor litigants from their subdistricts over litigants from other parts of the electoral district will undermine confidence in the judiciary. If the people believe that the judiciary is biased, regardless of whether it actually is biased, the

⁴ This Court has recognized the tension that exists for a popularly elected judge in remaining true to the law. "Financing a campaign, soliciting votes, and attempting to establish charisma or name identification are, at the very least, unseemly for judicial candidates' because 'it is the business of judges to be indifferent to popularity.'" Stevens, *The Office of an Office*, CHICAGO BAR REC. 276, 280, 281 (1974), cited in *Chisom v. Roemer*, 501 U.S. at 401 n.29.

effectiveness of the judiciary will be compromised. Izatt, *The Voting Rights Act and Judicial Elections: Accommodating the Interests of States Without Compromising the Goals of the Act*, 1996 U. ILL. L. REV. 229, 246 (1996).

Although the appellants seek subdistricting to improve judges' responsiveness to minorities (*see* Appellants' Brief at 5-7), creating subdistricts will not have the same impact on minority representation as it has in legislative elections. In legislative and administrative elections, officials are elected from a political subdivision to represent their constituents. The elected officials become part of a political decision-making body, such as a city council, school board, or legislature. Elected representatives form a collegial body charged with the responsibility of making decisions that reflect the policy preferences of their constituents. In the legislative/administrative context, single-member district elections ensure racial and language minority groups have the opportunity to elect individuals who will represent their interests--to the extent that race or language alone can define a cohesive community. (Even this contention, raised in the legislative context, raises the specter of racial stereotyping expressly disapproved by this Court in *Miller*, 115 S. Ct. at 2486, and *Shaw v. Reno*, 509 U.S. 630, 113 S. Ct. 2816, 2824-25 (1993).) However, in judicial districts, even in districts with two or more judges, trial court judges do not act as a group. Each judge is responsible for a specific portion of the caseload. Judges do not negotiate, discuss, compromise, or engage in give-and-take when deciding cases. Each judge acts alone in applying the law to the case at hand.⁵

⁵ This Court commented on this phenomenon in *Houston Lawyers' Association v. Attorney General of Texas*, 501 U.S. 419, by relating the concurring opinion of (continued...)

A corollary effect to subdistricting would be an increase in litigants' desire to forum shop. If judges are known to be responsive to a particular constituency, a member of that constituency will naturally seek to have his legal matters brought to that particular member of the judiciary. American jurisprudence has generally shown hostility to forum shopping. For example, the historical basis of diversity jurisdiction was to protect nondomiciliaries from local prejudice. *Betar v. DeHavilland Aircraft of Canada, Ltd.*, 603 F.2d 30, 35 (7th Cir. 1979), *cert. denied*, 444 U.S. 1098, *reh'g denied*, 445 U.S. 947 (1980). The theory on which jurisdiction is conferred on federal courts in controversies between citizens of different states has its foundation in the supposition that the state tribunal may not be impartial between its own citizens and nonresidents. *Pease v. Peck*, 59 U.S. (18 How.) 595, 599 (1855).

At one time the removal jurisdiction statute, 28 U.S.C. § 1441, expressly listed local bias as a reason for removal. 28 U.S.C. § 1441, historical note. All of the

⁵(...continued)

Judge Higginbotham to the decision under review. Judge Higginbotham argued that minority influence was lessened by making "only a few district court judges principally accountable to minority electorate rather than making all of the district's judges partly accountable to minority voters." *League of United Latin American Citizens Council v. Attorney General of Texas*, 914 F.2d 620, 649-51 (5th Cir. 1990), *cited in Houston Lawyers' Association*, 501 U.S. at 424. This Court did not deny the merit of this argument, instead choosing to "deliberately avoid any evaluation of the merits of the concerns expressed in Judge Higginbotham's opinion." *Houston Lawyers' Association*, 501 U.S. at 426.

provisions with reference to removal because of the inability, due to prejudice or local influence, to obtain justice, have since been discarded. The historical note to Section 1441 explains that "[t]hese provisions, born of the bitter sectional feelings engendered by the Civil War and the Reconstruction period, have no place in the jurisprudence of a nation since united by three wars against foreign powers." *Id.* So much has been done to eradicate biases; the subdistricting of judicial election districts is a swing in the wrong direction.

One of the major purposes of this Court's decision in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), was to eliminate or drastically curtail the evil of forum shopping. *Id.* at 74-75. The twin aims of the *Erie* rule were characterized by this Court as "discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Hanna v. Plumer*, 380 U.S. 460, 468 (1965). The *Hanna* decision viewed *Erie* as a reaction to the practice of forum shopping that developed in the wake of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842). *Hanna*, 380 U.S. at 467. See *Black and White Taxicab and Transfer Co. v. Brown and Yellow Taxicab and Transfer Co.*, 276 U.S. 518 (1928) (diversity jurisdiction existed although plaintiff reincorporated solely to create diversity); see also *O'Brien v. Avco Corp.*, 425 F.2d 1030, 1036 (2d Cir. 1969) (administrator was appointed to secure a federal forum because of alleged prejudice in state court; federal court viewed appointment "as a blatant example of precisely the type of forum-shopping that [the anticollusion statute] and cases like *Erie R.R. Co. v. Tompkins* ... were designed to prevent").

Additionally, the federal courts have consistently held that large multimember districts preserve judicial independence in the face of organized political interests groups. See, e.g., *Nipper v. Smith*, 39 F.3d 1494, 1556-57 (11th Cir. 1994) (plaintiffs argued that imposing subdistricting would

"unduly erode the independence of judges"); *League of United Latin American Citizens v. Clements*, 986 F.2d 728, 769-71 (5th Cir.), *rev'd*, 999 F.2d 831 (5th Cir. 1993) (*en banc*) (*LULAC III*) (stating that small single-member districts would make judges beholden to the particular racial group that elected them), *cert. denied*, ___ U.S. ___, 114 S. Ct. 878 (1994); *Nipper v. Chiles*, 795 F. Supp. 1525, 1547 (M.D. Fla. 1992) (agreeing with the state that the at-large nature of the challenged judicial electoral system creating a link between a judge's jurisdiction and elective base fosters judicial independence or at least the appearance of judicial independence), *rev'd sub nom. Nipper v. Smith*, 1 F.3d 1171 (11th Cir. 1993), *vacated*, 17 F.3d 1352 (11th Cir. 1994); *Magnolia Bar Association v. Lee*, 793 F. Supp. 1386 (S.D. Miss. 1992) (stating that judges are more independent in large districts than in small ones), *aff'd*, 994 F.2d 1143 (5th Cir.), *cert. denied*, ___ U.S. ___, 114 S. Ct. 555 (1993); *Southern Christian Leadership Conference v. Evans*, 785 F. Supp. 1469, 1479-80 (M.D. Ala. 1992) (determining a Voting Rights Act violation is more difficult in judicial elections than in others), *aff'd*, 56 F.3d 1281 (11th Cir. 1995), *cert. denied*, ___ U.S. ___, 64 U.S.L.W. 3453 (Jan. 8, 1996) (No. 95-647); *Clark v. Roemer*, 777 F. Supp. 471, 476 (M.D. La. 1991) (admitting evidence supporting the conclusion that longer terms and bigger election districts for the Courts of Appeal promote objectivity and detachment from local issues), *appeal dismissed*, 958 F.2d 614 (5th Cir. 1992).

Subdistricting robs judges of their independence by focusing a very narrow band of public opinion over their decision-making process. Yet appellants seek a court order in this case requiring what the District Court now views as a violation of the Fourteenth Amendment: subdistricting along racial lines with judges responsive to public opinion in their districts. Public opinion is an uncertain and constantly

shifting barometer of community emotion. Public opinion gives little consideration to the determinations of law and fact at issue in a case. Public opinion is concerned solely with results. See *Judicial Roulette*, 48 S.M.U. L. REV. at 467-68. Certainly, most judges set aside concern for their reelection standing and render decisions without regard for such considerations. However, a party on the losing side of a court decision or ruling affecting life, liberty, or property should not be left to wonder whether that decision or ruling was influenced by public opinion and prospects for reelection.

B. The Judiciary Performs an Antimajoritarian Role

Although this case involves state judges, the United States Constitution's treatment of the federal judiciary provides a compelling analogy to the special role expected of state judiciaries.

The framers of the Constitution intended judges and legislative representatives to be treated differently under the law. These officials are provided for in different articles in the body of the Constitution. U.S. Const. Arts. I and III.⁶

⁶ The California Constitution mirrors the federal Constitution with regard to separation of powers. Cal. Const. Art. III, § 3, provides:

The powers of state government are legislative, the executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution.

The California Constitution provides for legislative power in Article IV and judicial power in Article VI.

Further, the difference between legislative representatives, who curry favor with their constituents, and judges, who do not, is accentuated by the framers' recital of the duties and prohibitions of the respective offices. Judges simply cannot be considered "representatives" in the usual sense of the term because they do not have a constituency. Judges, be they trial or appellate, should apply the law as they see it, without a political agenda or interest.

Alexander Hamilton, in a sequence of Federalist Papers, stressed the importance of an independent judiciary. Far from equating judicial officers with "representatives," he expressed concern that the judiciary be free from the "encroachments and oppressions" of the representative body. The Federalist No. 78, at 465 (A. Hamilton) (C. Rossiter ed. 1961). The independent judiciary was held up to be "the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws." *Id.*

Not only was the judicial branch created to be nonrepresentative, but Hamilton asserted that "there is no liberty if the power of judging be not separated from the legislative and executive powers." *Id.* at 466 (quoting Montesquieu, *Spirit of Laws*, Vol. 1, at 186 (1750)). Furthermore, Hamilton was fully aware of the ever-changing whims of public opinion. Hence, the antimajoritarian role of the judiciary is clear:

[I]t is not to be inferred ... that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents incompatible with the provisions in the ... Constitution would, on that account, be justifiable in a violation of those provisions; or that the courts

would be under a greater obligation to connive at infractions in this shape than when they had proceeded wholly from the cabals of the representative body.

Id. at 469-70.

Hamilton cautioned strongly against allowing an independent judiciary to be infiltrated by a sense of responsiveness to segments of the community. The injection of public opinion only makes the work of a judge more difficult. *Id.* at 470.

Necessarily, judges' decisions may not reflect the majority will. Their decisions often must enforce constitutional guarantees in the face of majority opposition. As Justice Scalia noted in *Chisom v. Roemer*, 501 U.S. at 411 (Scalia, J., dissenting), "it is the prosecutor who represents 'the People'; the judge represents the Law--which often requires him to rule against the People." To fulfill this role, judges should be motivated solely by principle, not by perceived ties to constituents. A judge should never have to worry that an unpopular decision alone will cast him out of the judiciary.

Electors do serve, however, as a tool to rein in those members of the judiciary who see their role as one of making law rather than interpreting it. In no event, however, does the election create a duty to represent a particular constituency. Any hint to the contrary would render state courts unable to provide simple due process of law. Commentators note:

A realist perspective recognizes the dual characteristics of the judiciary: the public wants judges to be independent and impartial, but also seeks judges that are accountable to

citizens and sensitive to the impact of judicial decisions on society. Although tension exists in judicial performance of these twin roles, they are not inherently contradictory. Both functions emanate from a concern to safeguard the integrity and authority of the democratic political process.

Saks, *Redemption or Exemption?: Racial Discrimination in Judicial Elections Under the Voting Rights Act*, 66 CHI.-KENT L. REV. 245, 276 (1990).⁷ California's approach to this balancing act is reflected in its constitutional provisions linking electoral and jurisdictional bases (Article VI, Section 16(b)), and maintaining the integrity of political subdivisions as an electoral community of interest (Article VI, Section 5). Given the special constitutional role of judges analyzed above, this Court should commend the District Court's order that avoided rendering judges more like legislators. This Court should further affirm that the District Court's caution was amply warranted by the Fourteenth Amendment and the expressed wishes of the people of California.

⁷ See also Canon, *Judicial Election and Appointment at the State Level: Commentary on State Selection of Judges*, 77 KY. L.J. 747, 757 (1989), arguing that while judges should not be spineless politicians following the whims of every transient majority or helping to whip up the passions of the day, their devotion to logic or principles should not be so great that they are disdainful of the actual consequences their decisions have on society. Canon concludes that "[t]he Grail of perpetually balanced judicial accountability and independence will never be found, but we should not abandon the search." *Id.*

**EXPANDING THE BREADTH OF
SECTION 5 PRECLEARANCE PROCEEDINGS
VIOLATES THE TENTH AMENDMENT**

Courts should not compel states to adopt remedial measures that contravene state laws codifying important state interests. *Magnolia Bar Association v. Lee*, 793 F. Supp. at 1417. The theoretical basis for this assertion originates in a long line of Supreme Court cases recognizing the right of a state to assert its sovereignty by defining who will, and who will not, exercise governmental authority. *Gregory v. Ashcroft*, 501 U.S. 452, 457, 472-73 (1991) (finding that Article V of the United States Constitution grants the people of Missouri the right to determine whether judges must retire by a certain age); *Taylor v. Beckham*, 178 U.S. 548, 570-71 (1900) ("It is obviously essential to the independence of the states, and to their peace and tranquility, that their power to prescribe the qualifications of their own officers ... should be exclusive and free from external interference, except so far as plainly provided by the Constitution of the United States."); *Boyd v. Nebraska, ex rel. Thayer*, 143 U.S. 135, 161 (1892) ("Each state has the power to prescribe the qualifications of its officers, and the manner in which they shall be chosen."). Wholesale changes or intrusive alterations of the nature and operation of a state's judicial branch violate the principles of federalism ensconced in the Tenth Amendment to the United States Constitution.⁸ This Court has, in just the past few years, more fully explored the scope of this constitutional provision.

⁸ The Tenth Amendment to the United States Constitution provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

In *Gregory v. Ashcroft*, 501 U.S. 452, this Court read the Age Discrimination in Employment Act narrowly to avoid a construction that would have overturned Missouri's mandatory retirement age for state judges. "Through the structure of its government," the Court commented, "and the character of those who exercise government authority, a State defines itself as a sovereign." *Id.* at 460. Thus, Missouri's decision to retire judges at age 70 was the "prerogative" of "citizens of a sovereign State." *Id.* at 473. The federal government cannot tell the states to retain judges over the age of 70, because that command would destroy the ability of state citizens to "choose their own officers for governmental administration." *In re Duncan*, 139 U.S. 449, 461 (1891).

In *New York v. United States*, 505 U.S. 144 (1992), this Court struck down a provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. § 2021b, because the provision commanded states either to enact laws regulating the disposal of low-level radioactive waste or to take title to all low-level radioactive waste generated within their borders. The Court distinguished firmly between congressional power "to pass laws requiring or prohibiting certain acts" by private parties and congressional attempts "to compel the States to require or prohibit those acts." *Id.* at 165. The former is consistent with the Supremacy Clause, while the latter destroys the accountability of state officials to their electorate. *Id.* at 178-79. Congress, therefore, could not "simply ... direct the States to provide for the disposal of the radioactive waste generated within their borders." *Id.* at 188.

In the context of the Voting Rights Act, federal judges, as well as the Department of Justice, should similarly

respect state sovereignty.⁹ Members of this Court have long recognized that Section 5 of the Voting Rights Act, even with its plain language construction (in contrast with the Justice Department's broad interpretation), mandates severe intrusion by the federal government into state electoral autonomy. Justice Black wrote:

I cannot help but believe that the inevitable effect of any such law which forces any one of the States to entreat federal authorities in far-away places for approval of local laws before they can become effective is to create the impression that the State or States treated in this way are little more than conquered provinces.

South Carolina v. Katzenbach, 383 U.S. 301, 359-60 (1966) (Black, J., concurring in part and dissenting in part). Even though the majority opinion in *Katzenbach*, 383 U.S. at 335, upheld Section 5 as necessary and constitutional, the limitations on Section 5's intrusiveness were recognized in *Miller*, 115 S. Ct. at 2493: "As we recalled in *Katzenbach* itself, Congress' exercise of its Fifteenth Amendment authority even when otherwise proper still must be consistent 'with the letter and spirit of the constitution.'" *Katzenbach*, 383 U.S. at 326, cited in *Miller*, 115 S. Ct. at 2493.

⁹ One commentator suggests that state sovereignty also warrants protection under Article IV, Section 4, of the United States Constitution--the Guarantee Clause. See generally Merritt, *Republican Governments and Autonomous States: A New Role for the Guarantee Clause*, 65 U. COLO. L. REV. 815 (1994).

A state's sovereignty, consistent with the Tenth Amendment, must be recognized in determining the extent to which federal courts and the Justice Department will be permitted to restructure election changes made without discrimination. Federalism concerns consistent with the Tenth Amendment have been formalized by the rule that a statute will not be construed to undercut state authority unless there is a showing of the "unambiguous intent" of Congress to effect the purpose. *New York v. United States*, 505 U.S. at 171. "In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of a clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Id.* Even as construed in *Beer v. United States*, 425 U.S. 130 (1976) (announcing retrogression principle), Section 5 is indisputably a serious intrusion into the normal federal-state balance of authority. See, e.g., *United States v. Board of Commissioners*, 435 U.S. 110, 141 (1978) (Stevens, J., dissenting). To go beyond the retrogression limits of the freezing remedy permitted by *Beer* would be a huge extension of Section 5, an extension for which there is a glaring absence of the necessary "clear statement" from Congress. Without congressional intent, and with the understanding that racially drawn district lines violate the Fourteenth Amendment, the District Court correctly refused to infringe upon the constitutionally protected sovereignty of the State of California.

In *Chisom v. Roemer*, Justice Scalia wrote in dissent that "Section 2 of the Voting Rights Act of 1965 is not some all-purpose weapon for well-intentioned judges to wield as they please in the battle against discrimination." *Chisom*, 501 U.S. at 404 (Scalia, J., dissenting).¹⁰ The same

¹⁰ Section 2 is codified at 42 U.S.C. § 1973(a).

sentiment is even more true for Section 5.¹¹ The burden placed on California by the court below has the potential to require California to totally rework its state judicial election system, despite the state constitutional requirements. In a case where no intentional discrimination exists, a federal court should not encourage the dramatic alteration of the state system.

CONCLUSION

To ascribe particular sets of views to judges because of the color of their skin is clearly in error. Yet the appellants seem to believe that only a member of a minority group will be responsive to the interests of that group, even when the members of the minority group themselves do not believe that to be true. This Court should hold that the District Court correctly ruled that Monterey County and the State of California need not implement, at least on an interim basis, subdistricted judgeship elections. Municipal Court judges elected by individuals divvied up into racial segments of the population would be accountable, as "representatives," to a smaller, more ethnically and racially homogenous population in violation of the Fourteenth Amendment. The District Court correctly ruled to avoid that unconstitutional result.

Requiring judges to be "representatives" insults not only the judges who sit on the bench, but the entire elec-

¹¹ This Court has twice found "insupportable" the Department of Justice's heavy-handed application of Section 5 to require states to maximize the number of minority districts. *Shaw v. Hunt*, 1996 WL 315870 at *8 (citing *Miller*, 115 S. Ct. at 2492).

torate. To hold, in effect, that a Hispanic litigant is more likely to receive a sympathetic ear from a Hispanic judge, who will not ignore minority interests, *see Thornburg v. Gingles*, 478 U.S. 30, 48 n.14 (1986), impugns the integrity of both Hispanic and non-Hispanic judges. Judges of all races, creeds, and colors are presumed to be impartial; presumed to decide cases on the merits, not on the color or political persuasion of the litigants. Moreover, to require a state to violate the nondiscriminatory provisions of its constitution in a way which furthers the goal of racial division violates the Tenth Amendment.

For the reasons expressed above, the decision of the District Court for the Northern District of California should be affirmed.

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Respectfully submitted,

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